

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946/7

No. 1003 39

**AERO MAYFLOWER TRANSIT COMPANY,
APPELLANT,**

vs.

**BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF MONTANA, ET AL.**

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

FILED FEBRUARY 10, 1947.

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[fol. 1]

[Caption omitted]

[fol. 2]

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL
DISTRICT OF THE STATE OF MONTANA IN AND
FOR THE COUNTY OF SILVER BOW**

No. 38175

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, Paul T. Smith, Horace F. Casey and Austin B. Middleton, as Members of and Constituting the Board of Railroad Commissioners of the State of Montana,
Plaintiffs,

vs.

AERO MAYFLOWER TRANSIT COMPANY, a Corporation,
Defendant

COMPLAINT—Filed October 13, 1939

The plaintiffs for their cause of action against the defendant allege:

I

That plaintiff Board of Railroad Commissioners of the State of Montana is and at all times herein mentioned has been a public board and body and one of the official commissions and departments of government of the State of Montana duly created and existing under and by virtue of the laws thereof; that Paul T. Smith, Horace F. Casey and Austin B. Middleton are the duly elected, qualified and acting members of the Board of Railroad Commissioners of the State of Montana and bring this action on behalf of the State of Montana.

IV

That the Aero Mayflower Transit Company is a corporation organized and existing and doing business under and by virtue of the laws of the State of Indiana.

III

That by virtue of the authority vested in and conferred [fol. 3] upon plaintiff Board of Railroad Commissioners of the State of Montana and its members as aforesaid by

Chapter 184 of the Laws of Montana the Twenty-second Legislative Assembly of the State of Montana, 1931, and the laws amendatory thereof, said Board is vested with power and authority and jurisdiction to supervise and regulate every motor carrier in the State of Montana as defined in the aforesaid Chapter 184.

IV

That under the terms of said Chapter 184, Laws of 1931, every person, firm or corporation who is engaged in or engages in the operation of motor vehicles upon any public highway in the State of Montana for the transportation of persons and/or property for hire on a commercial basis either as a common carrier or under private contract, charter, agreement or undertaking, is designated as a motor carrier and as such is required to apply for and secure a certificate of public convenience and necessity from the aforesaid Board before he, they or it can operate any motor vehicles upon the public highways of the State of Montana for the transportation of freight, express or passengers for hire.

V

That on or about the 12th day of October, 1939, the defendant, Aero Mayflower Transit Company, operated and is now operating for public service within the State of Montana motor vehicles for the transportation of property for hire on a commercial basis and in so doing is transporting property belonging to third persons for hire on a commercial basis, as a common carrier or under private contract, agreement and undertaking over and upon the public highways of the State of Montana.

VI

[fol. 4] That at no time mentioned in this complaint and at the time of the filing of this complaint has the defendant, Aero Mayflower Transit Company, a franchise, permit or certificate of public convenience and necessity authorizing it, the said Aero Mayflower Transit Company to transport property by motor vehicles over or on the public highways of the State of Montana as a motor carrier or at all, or for hire on a commercial basis, and that said defendant, Aero Mayflower Transit Company, does not now have and has not had at the time herein mentioned or at all, such franchise,

permit and certificate of public convenience and necessity; and plaintiffs allege that the defendant, Aero Mayflower Transit Company, has refused to abide by the rules and regulations of the State of Montana and the laws of the State of Montana in order to permit it to operate as a motor carrier over the public highways of the State of Montana and that it intends to continue operating motor vehicles for transportation of property for hire on a commercial basis on the public highways of the State of Montana without such franchise, permit or certificate of convenience and necessity and that unless restrained by order of this court the said defendant will continue to operate motor vehicles over the public highways of the State of Montana, for the transportation of property for hire on a commercial basis and as a common carrier or under private contract, agreement or undertaking; that plaintiffs further allege that such actions of the defendant hereinbefore set forth result in an unlawful and unauthorized use of the public highways of the State of Montana, all to the great and irreparable damages of the State of Montana and the people thereof in the maintenance and operation of adequate and well regulated systems of transportation and results in the citizens of the State of Montana, being without adequate or any protection against the negligent operation of motor vehicles operated by the said defendant, Aero Mayflower Transit Company, as hereinbefore set forth and described, and, furthermore, such action of the defendant as heretofore described results in great and irreparable damage to duly licensed motor carriers in the State of Montana who have complied with the Motor Carrier Laws of this State and particularly with Chapter 184 of the Laws of Montana of the Twenty-second Legislative Assembly of the State of Montana, 1931, and the laws amendatory thereof; that such actions of the defendant places an undue burden on the public highways of the State of Montana and results in great and irreparable damages to the citizens of the State of Montana and the duly licensed motor carriers in said State in that the defendant seeks to use the public highways of Montana for pecuniary gain without contributing its share of fees for the construction, maintenance, operation and regulation of the public highways of the State of Montana as provided for by the laws of the State of Montana relating to motor carriers.

VII

That plaintiffs are without any adequate or speedy remedy at law for the wrongs and injuries to the public herein complained of and practiced against the public by the said defendant, and that this action is brought pursuant to the provisions of Section 14, Chapter 184, Laws of 1931, authorizing the Board of Railroad Commissioners of the State of Montana to apply to any court of competent jurisdiction in any county where a motor vehicle is engaged in business, for the enforcement of said Chapter 184, Laws of 1931, and the rules, regulations and orders of this Board made pursuant thereto.

[fol. 6] Wherefore, plaintiffs pray that the defendant, Aero Mayflower Transit Company, its agents, servants and employees and all persons acting by, through or under it be permanently enjoined and restrained from operating motor vehicles upon any public highways in the State of Montana for the transportation of property for hire on a commercial basis, either as a common carrier or under private contract, charter, agreement or undertaking until such time as it has complied with the provisions of Chapter 184, Laws of 1931 and the laws amendatory thereto, and the rules and regulations of the Board of Railroad Commissioners of the State of Montana adopted thereunder; that an order to show cause be issued requiring the defendant to appear at a time and place therein specified to show cause if any it may have why it should not be enjoined in like manner during the pendency of this litigation, and that a temporary restraining order to like effect issue and remain in effect until final hearing and decision upon plaintiffs' complaint for permanent injunction; and for plaintiffs' costs of suit and disbursements herein necessarily incurred.

Harrison J. Freebourn, Attorney General of the State of Montana; W. E. Coyle, W. B. F., County Attorney of Silver Bow County, Montana; John W. Bonner, Counsel, Board of Railroad Commissioners of the State of Montana, Attorneys for Plaintiffs.

DEMURRER—Filed October 31, 1939

Comes now the defendant Aero Mayflower Transit Company, a corporation, and expressly reserving and saving to itself all of its rights to resist the alleged order to show cause returnable herein on November 6, 1939, and to move against the temporary restraining order heretofore issued herein, demurs to the complaint of plaintiffs herein upon the following grounds:

I

That the plaintiff Board of Railroad Commissioners of Montana, and the individuals constituting the same and attempting to sue as such Board, do not have the legal capacity to sue in that said Board is the creature of Ch. 37, Laws 1907, as amended (Sections 3779-3817, R. C. M. 1935) possessing only the powers granted thereby or necessarily and directly implied therefrom, and by the provisions of Section 3806, Revised Codes of Montana, 1935, the action or proceeding must be by and in the name of the State of Montana.

II

That there is a defect of parties plaintiff in that the State of Montana is a necessary and indispensable party plaintiff pursuant to the provisions of Section 3806, Revised Codes of Montana, 1935, and Section 3847.14, Revised Codes of Montana, 1935.

III

That said complaint fails to state facts sufficient to constitute a cause of action against this defendant, and/or to warrant the issuance of a temporary restraining order, or any other injunctive process against defendant, in that:

[fol: 8] (1) Said complaint fails to state facts showing that defendant is in any respect subject to the alleged jurisdiction of the said Board of Railroad Commissioners.

(2) Said Chapter 184, Laws 1931, referred to in said complaint, shows on its face that defendant is not subject to the asserted jurisdiction of said Board.

(3) Said complaint fails to state any fact or facts whatsoever showing that defendant's acts result in irreparable, or any injury, to any one.

(4) Said complaint fails to contain any fact or facts justifying the intervention of a court of equity.

IV

Said complaint and the affidavit served therewith fail to state facts sufficient to warrant the intervention of a court of equity by way of a temporary restraining order granted without notice as was done herein, or by way of temporary injunction, or by way of permanent injunction, or at all.

Done and Dated October 30, 1939.

E. G. Toomey, Toomey, McFarland & Chapman, Attorneys for Defendant.

IN THE DISTRICT COURT, SILVER BOW COUNTY

ORDER OVERRULING DEMURRER OF DEFENDANT—Minute Entry
of January 20, 1940

This day the demurrer of the defendant to plaintiff's Complaint, herein, heretofore heard and submitted and by the Court taken under advisement, is overruled and said defendant is given twenty (20) days to answer said complaint.

IN THE DISTRICT COURT, SILVER BOW COUNTY

[fol. 9] ANSWER AND CROSS-COMPLAINT OF DEFENDANT
Filed March 11, 1940

Comes now Aero Mayflower Transit Company, a corporation, and for its answer to the complaint of plaintiffs, admits, denies and alleges as follows:

I

Answering paragraph I of said complaint, defendant admits all the allegations thereof except that defendant denies that plaintiffs bring this action on behalf of the State of Montana, and allege that plaintiffs bring this action on their own initial motion, absent any order or direction by the Governor or by the Attorney General of the State of

Montana authorizing or directing the institution of this action.

II

Answering paragraph II of said complaint, defendant admits that it is a corporation organized and existing under and by virtue of the laws of the State of Kentucky; defendant denies that it is a corporation organized and existing under or by virtue of the laws of the State of Indiana.

III

Answering the allegations of paragraph III of said complaint, this defendant denies the same.

IV

Answering the allegations of paragraph IV of said complaint, this defendant denies the same.

V

Answering the allegations of paragraph V of said complaint, this defendant denies the same.

VI

Answering the allegations of paragraph VI of said complaint, this defendant denies the same.

[fol. 10]

VII

Answering the allegations of paragraph VII of said complaint, this defendant denies the same.

VIII

Answering, further, said complaint, this defendant denies each and every allegation in said complaint not hereinbefore specifically admitted or denied.

Further and Affirmative Defense and Cross-Complaint

Comes now the defendant above named herein for brevity called the carrier, and for its further and affirmative defense, and also by way of cross-complaint against plaintiffs herein, hereinafter referred to as the Board, shows to the court:

A

The carrier is, and has been since September, 1928, a corporation organized and existing under and pursuant

to the laws of the State of Kentucky, with its principal office in the City of Indianapolis, State of Indiana; that it owns and operates a fleet of motor trucks, inclusive of the trucks occasionally within the State of Montana as hereinafter referred to, all of which are licensed under the laws of the State of Indiana, and carry at all times license plates of the State of Indiana; that its business is that of transporting by motor vehicle, in interstate commerce only, over the highways of the United States used household goods and office furniture, incident only to the change of residence of the owner of such goods, under a separate order for such transportation and given in each instance by or on behalf of the owner of said goods, at the rate for such transportation set out in its schedule of rates on file with the Interstate Commerce Commission of the United States. That each shipment is transported under a separate contract [fol. 11] therefor, and maybe from any point in the United States to any other point in the United States, so long as the point of destination is in a state other than the state within which the shipment originates. That the carrier does not operate its motor trucks, or any of them, on any fixed schedule, or over any regular routes. Shipments of furniture from without the state are transported to and delivered to points within the state, or shipments of furniture originating within the state are transported to points without the state, or shipments of furniture in transit are transported through the state, or motor trucks without load are driven through the state. That carrier never has done and does not now do or carry on and has no intention of carrying on hereafter any intrastate business in the State of Montana and that its operations with respect to the State of Montana have at all times been interstate operations into, out of, across or through said State. That it has been granted, and now operates under, Permit No. 2934 issued to it by said Interstate Commerce Commission, under and pursuant to the provisions of the Federal Motor Carrier Act of 1935, as a common carrier.

B

That the plaintiff Board of Railroad Commissioners of the State of Montana is an administrative tribunal of the State of Montana, created by an act (Chapter 37, Laws of Montana, 1907, now as amended, Sections 3779-3817 Revised

Codes of Montana, 1935) of the Legislative Assembly of Montana, with power to sue in the name of the State of Montana and to be sued in the courts of the United States and of the State of Montana.

The plaintiffs Paul T. Smith, Horace F. Casey and Austin B. Middleton, are the duly and regularly elected, [fol. 12] qualified and acting members of and constitute the said Board of Railroad Commissioners of Montana, established by the act aforesaid.

The said Board has by the terms of said original act (Sec. 16, Ch. 37, Laws 1907, now Sec. 3797 Revised Codes of Montana, 1935) general supervision of all railroads, express companies, car companies, sleeping-car companies, freight and freight line companies, engaged in the transportation of passengers or property in intrastate commerce within the State of Montana, inclusive of regulation of the intrastate rates and services of such carriers.

The said Board was by an act (Ch. 52, Laws of Montana, 1913, now as amended, Sections 3879-3913, Revised Codes of Montana, 1935) of the Legislative Assembly of Montana, made ex-officio, the Public Service Commission of the State of Montana and invested with the power to supervise and regulate the operations of persons, firms, associations or corporations, private or municipal, producing, delivering or furnishing for or to the persons, heat, street-railway service, light, power in any form or by any agency, water for business, manufacturing, household use, or sewerage service, telegraph or telephone service, to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village.

The said Board was by an act (Chapter 63, Laws of Montana, 1914, now as amended, Sections 3859-3878 Revised Codes of Montana, 1935) of the Legislative Assembly of Montana further invested with powers to inspect, regulate and supervise steam vessels, other boats propelled by machinery, sailing craft, ferry boats and barges on the navigable waters of the State of Montana, and house boats, captains and pilots engaged in the carrying of passengers [fol. 13] and freight on said waters, and enforce safety regulations applicable to such boats, captains and pilots.

The said Public Service Commission was by an act of the Legislative Assembly of Montana (Ch. 109, Laws 1927, now as amended, Sections 3913.1-3913.24, Revised Codes

of Montana, 1935) invested with power to license all persons, firms and corporations in Montana, engaged in the business of refining, manufacturing, or keeping for sale any gasoline, kerosene, distillate, road oil, fuel oil, lubricating oils and greases, inspecting such products; testing the same and enforcing standards of quality and strength with respect thereto.

The said Board was by an act of the Legislative Assembly of Montana (Ch. 223, Laws of Montana, 1919, now as amended, Sections 3914-3946 Revised Codes of Montana, 1935) made ex-officio, the Montana Trade Commission, with power to fix rules, charges, rates, tolls and maximum profits of public mills as defined in said act, i.e., elevators, mills, factories, milling, manufacturing or producing flour, bran, mill-feed, or products or commodities of any kind, from wheat, oats, or other grain.

The said Montana Trade Commission was by an act of the Legislative Assembly of Montana (Ch. 80, Laws of Montana, 1937, not integrated in the Revised Codes of Montana, 1935) made administrator of the "Unfair Practices Act" of the State of Montana, with power thereunder to prevent unfair competition and discrimination, or sales below cost, among sellers of merchandise in the State of Montana, in violation of principles, practices and standards prescribed by said act.

The said Board was by an act of the Legislative Assembly of Montana (Ch. 8, Laws of Montana, Extra Session 1921, [fol. 14] now Sections 3848-3858 Revised Codes of Montana, 1935) invested with power to regulate and supervise the operations, services, rates and charges of all persons, firms and corporations owning or operating any pipe line within the State of Montana, for the transportation of crude petroleum to or for the public for hire, or engaged in the business of transporting crude petroleum.

The said Board was by an act of the Legislative Assembly of Montana (Ch. 184, Laws of Montana, 1931, now as amended, Sections 3847.1-3847.28, Revised Codes of Montana, 1935) vested with power and authority to supervise and regulate every motor carrier in the State of Montana, as in said act defined, viz.,

"The term 'motor carrier', when used in this act, means every person or corporation, their lessees, trustees, or receivers appointed by any court whatsoever, operating motor

vehicles upon any public highway in the state of Montana, for the transportation of persons and/or property for hire, on a commercial basis either as a common carrier or under private contract, agreement, charter, or undertaking; provided that nothing in this act shall be construed as affecting the operation of school busses which are used in conveying school children to and from district or other schools, or to the transportation of freight or passengers by motor vehicles when done occasionally and not as a regular business, or to the transportation by means of motor vehicles in the regular course of business of employees, supplies and materials by any person, firm or corporation engaged exclusively in the construction or maintenance of highways, or engaged exclusively in logging or mining operations, insofar as the use of employees, supplies and materials in construction and production is concerned."

[fol. 15] That none of said acts have been repealed and said Board assumes to and does daily administer each thereof and enforce, and threaten the enforcement of each thereof upon the persons, firms and corporations subject thereto, all of said plaintiff members of said Board daily devoting their time to different duties under said various administrative heads in the multiple areas of official activity assigned and delimited by the Legislative Assembly of the State of Montana to said Board, and using and employing the monies in the Motor Carrier Fund of said Board, hereinafter referred to, for their various official activities under the said multiple administrative heads.

C

That under date of October 3, 1935 the Board of Railroad Commissioners of the State of Montana, assumed to and did issue to this carrier its certificate sometimes styled "Permit", No. 1354, for interstate operations only, assuming and pretending to act pursuant to the provisions of said Chapter 184, Session Laws of 1931, of the State of Montana, which "permit" assumed to grant to this carrier the right to transport property as a common carrier in interstate service by motor vehicles for hire, over and on the public highways of the State of Montana, and which "permit" remained in full force and effect until the 9th day of October, 1939, on which latter date the said Board assumed and pretended to issue an order, purporting to cancel and

terminate said certificate, or "permit". That the "permit" so issued by the Board related to that class known as "Class C Motor Carriers" as defined in said Chapter 184 of the Session Laws of 1931.

That under date of September 19, 1939 the Board of Railroad Commissioners of the State of Montana assumed [fol. 16] to and did issue an order directing the carrier herein to appear before it on October 6, 1939 to show cause, if any, why any right or rights, permit or permits granted it by said Board to operate as a Motor Carrier over the public highways of the State of Montana should not be revoked and cancelled, a copy of said order to show cause, marked Exhibit "A", being attached hereto, and by reference, made a part hereof the same as if fully written out herein.

That on October 6, 1939, this carrier appeared before said Board and filed its written return to said order to show cause, a copy of said return, marked Exhibit "B", being attached hereto and by reference made a part hereof the same as if fully written out herein; and then and there at the hearing thereon, there was offered by this carrier and received in evidence sworn credible and substantial testimony in support of said return, and no other evidence was offered by any person or interest, or received at said hearing by said Board.

That under date of October 9, 1939, the Board issued an order purporting and pretending to cancel and terminate carrier's "permit" issued as aforesaid, a copy of said purported order of cancellation and termination, marked Exhibit "C", being attached hereto and by reference made a part hereof the same as if fully written out herein and therewith advised carrier that any attempt on its part to operate its vehicles over the highways of Montana in the interstate commerce aforesaid, would result in seizure, impoundment and confiscation of its trucks, arrest and trial of its drivers whenever and wherever any of said trucks with drivers were found on the highways of Montana, and the repeated attempt by said Board at infliction of fines and penalties for each and every daily movement of trucks and [fol. 17] drivers. Upon receipt of notice of such purported order of termination and cancellation of its permit in Montana, carrier to avoid the seizure and impoundment of its trucks, delays, detentions and conversions of loads in transit, fines and penalties provided in said Chapter 184, Laws

1931, ceased its operations in interstate commerce into, out of or across the said State of Montana, except with respect to three of its trucks which at the time of receipt of said order were then already in, or nearing, the State of Montana, and which trucks completed the shipments then in actual transit. Since the completion of said shipments so in transit at said time, the carrier did not operate, or attempt to operate any of its trucks or equipment in interstate commerce into, out of or across the said State of Montana, until subsequent to December 5, 1939, as hereafter appears. That this carrier thereupon commenced the preparation of litigation in its behalf, when it was served on or about October 15th, 1939 with the thirty day temporary restraining order herein in this action commenced by the Board on October 13, 1939. That on the date of the issuance of the temporary restraining order in this case, to-wit, on October 13, 1939, as aforesaid this carrier was not operating any of its trucks or equipment into, out of or across the said state of Montana or within the boundaries of the state of Montana and it did not operate of such trucks or equipment within the boundaries of the state of Montana following the issuance of the restraining order herein, until sometime subsequent to December 5, 1939, following dissolution of said restraining order by the above entitled court after hearing upon application of this carrier, said order of dissolution being conditioned on delivery of \$5000.00 bond by this carrier as [fol. 18] appears in the files herein, for the protection of the tax demands of said Board.

D

Use of Montana Highways by Carrier

1937: This carrier alleges that during the calendar year of 1937 twenty-five (25) different pieces of equipment of various weights and sizes, entered, crossed, or went out of the State of Montana, all in interstate commerce exclusively, the same bearing Indiana license plates numbered 3867, 3888, 3919, 3922, 3856, 3874, 3930, 3923, 3858, 3859, 3902, 3905, 3906, 3908, 3915, 3921, 19710, 2906, 3860, 3889, 3938, 19727, 141594, 141671, respectively; that one or more of said motor vehicles entered, crossed or went out of the State of Montana more than once during the said calendar year of 1937 as follows:

Six pieces of such equipment made only one trip each, into, out of, or through the state of Montana; ten different pieces of such equipment made two trips each, 1 made three trips, 3 made four trips, 2 made five trips and 3 made eight trips into, out of or through the State of Montana during the year 1937. The total number of days or parts of days during the year 1937 that all of such equipment made any use of the highways of Montana, was 227 days, or an average use per day of Montana highways in interstate commerce throughout the year 1937 by any single piece of equipment, of eight (8) days. That all of said several pieces of equipment traveled 227 days during said calendar year 1937 in entering, crossing, or going out of the said State of Montana, that all of said several pieces of equipment traveled in interstate commerce exclusively 10,077-empty, and 27,205 loaded, miles, a total of 37,265 miles, within the boundaries of the State of Montana for said year of 1937.

[fol. 19] 1938: *This carrier alleges that during the calendar year 1938 forty (40) different pieces of its motor equipment of various weights and sizes, entered, crossed or went out of the State of Montana, all in interstate commerce exclusively, the same bearing Indiana license plates numbered 3280, 3284, 3298, 3321, 3328, 3327, 3338, 3355, 3364, 3365, 3379, 3231, 3303, 3324, 3340, 3342, 3353, 3354, 3356, 3360, 3361, 3366, 3367, 3372, 3376, 3382, 3275, 3301, 3308, 3348, 3351, 15811, 941, 3222, 3273, 3330, 3368, 3384, 15820, and 3375, respectively; that some of said several pieces of equipment entered or left or crossed the state of Montana more than once during said calendar year as follows:*

Ten different pieces of such equipment made two trips each, 8 made three trips each, 5 made four trips each, 1 made five trips, 1 made six trips, 1 made seven trips, 3 made eight trips each and 1 made fifteen trips into, out of or through the State of Montana during the year 1938. The total number of days or parts of days during the year 1938 that all of such equipment made any use of the highways of Montana, were 385, or an average use per day of Montana highways in interstate commerce throughout the year 1938 by any single piece of equipment, of nine days. That all of said pieces of equipment traveled 385 days during the said calendar year of 1938 in entering, crossing or going out of the said State of Montana; that all of said pieces of equipment traveled in interstate commerce exclusively 18,642 empty, and 44,254 loaded, miles, a total of 62,896

miles within the boundaries of the State of Montana during said calendar year 1938.

1939: *This carrier alleges that during the calendar year of 1939* forty-four (44) different pieces of its motor equipment of various weights and sizes, entered, crossed or [fol. 20] went out of the State of Montana, all in interstate commerce exclusively, and all bearing Indiana license plates 4676, 4620, 4635, 4636, 4641, 4643, 4645, 4649, 4314, 4660, 4674, 4681, 4688, 4689, 4694, 4704, 4706, 4708, 4710, 4712, 4714, 4717, 4724, 4728, 4729, 4730, 4732, 4735, 4736, 4737, 4738, 4740, 4742, 4743, 4751, 4753, 4755, 4756, 4757, 4759, 4760, 15427, 15428, 15430; that some of said several pieces of equipment entered or left or crossed the State of Montana more than once during said calendar year as follows:

Nineteen different pieces of such equipment made one trip each, 7 made two trips each, 4 made three trips each, 4 made four trips each, 4 made five trips each, 4 made six trips each, 1 made seven trips and 1 made eight trips, into, out of or through the State of Montana during the year 1939.

That all of said pieces of equipment traveled 405 days during said calendar year of 1939 in entering, crossing or going out of the said State of Montana, that all of said pieces of equipment traveled in interstate commerce exclusively 18,617 empty, and 47,847 loaded, miles, a total of 66,464 miles within the boundaries of the State of Montana during said calendar year 1939. The total number of days or parts of days during the year 1939 that all of such equipment made any use of the highways of Montana was 405, as aforesaid, or an average use per day of Montana highways in interstate commerce for said period by any single piece of equipment of nine days.

That defendant refused and continues to refuse to pay said fees to said plaintiff Board as prescribed by said Chapter 184, Laws 1931 and said Chapter 100, Laws of 1935.

E

Taxes Demanded by State of Montana for Alleged Highway Use and Paid by Carrier

[fol. 21] (1) This carrier further alleges that pursuant to the provisions of Sections 1760-1760.10, Revised Codes of Montana, 1935, it has during each of the years 1937, 1938 and 1939 at and upon the demand of the license tax officers of the State of Montana, registered and-licensed the afore-

said pieces of its equipment which entered the State of Montana during each of said years; that for such registration and license plates of the State of Montana it paid to the State of Montana for the year 1937 the sum of \$660.50, for the year 1938 the sum of \$1212.52 and for the year 1939 the sum of \$1630.50; that said sums so paid for said registration and license plates were payable, and paid, as compensation for the use by this defendant of highways in and of the State of Montana; that by the express terms of said statutes all of such registration and license plate fees are appropriated and allocated to a fund to be used by subdivisions of, and in, the State for the construction, repair and maintenance of highways in the State of Montana.

(2) This carrier further alleges that, in addition to the license taxes and exactions aforesaid demanded by the State of Montana from this carrier, for the use of Montana highways in the conduct of the interstate business of this carrier, this carrier pays to the State of Montana further and additional taxes for the operation of its motor vehicles, into, out of, through or across the State of Montana, in this, to-wit:

Chapter 95, Laws of Montana, 1931 (Sections 2381.1-2396.9 Revised Codes of Montana, 1935, followed by Initiative Measure No. 41, adopted by a vote of the people of Montana at a general election held November 8, 1938, effective by virtue of proclamation of the Governor of Montana on November 13, 1938, known as "The State Highway Treasury Anticipation Debentures Act of 1938" provide an [fol. 22] excise or license tax for the privilege of engaging in or carrying on the business of refining, manufacturing, producing, impounding or selling, shipping, transporting, importing and distributing gasoline for use in motor vehicles, of five (5c) cents per gallon, which tax is intended to be and in practice is, exacted from every buyer and purchaser of gasoline in the State of Montana and this carrier in the conduct of its interstate transportation business into, out of, across and through the State of Montana, purchases large quantities of said gasoline upon which it pays at and upon the demand of the collectors thereof directly, and at the instant of purchase, the said tax of five (5c) cents per gallon, all of the proceeds of which taxes are used by the State of Montana for the construction, preservation and maintenance of the roads and highways

of the state, including the Federal Aid Highway system in Montana, and all of which proceeds are, in addition, pledged to the payment of said state highway treasury anticipation debentures, under the Initiative act aforesaid, issued to borrow money for the construction, betterment and maintenance of the state highways and roads of the State of Montana, including the federal aid system. In the year 1937 this carrier paid an approximate total of \$745.30 to the State of Montana for such gasoline taxes, for the year 1938 an approximate total of \$1257.92 and for the first ten months of the year 1939 to the date of suspension of its operations by said restraining order an approximate total of \$1649.98 for such gasoline taxes.

The moneys paid by this carrier to the State of Montana, Motor Vehicle License Department, and to the State of Montana, for such Gasoline Excise Highway Debenture tax, exceeded in the years 1937 and 1938, two cents for every mile traveled via motor vehicle operated by this carrier in [fol. 23] interstate commerce over the highways of Montana and in the year 1939, exceeded two and one-half cents for every like mile. That such charges so collected by said departments of the government of said state constitute and are more than a reasonable compensation to be paid by this carrier for the occasional use of Montana highways in interstate commerce or for any other benefit received by this carrier from said State of Montana or any department thereof. That a portion of such license plate and gasoline tax charges is excessive and unreasonable and the same, together with any additional charges sought to be collected by the Board herein, constitute and are, and if collected in the future, will be, unreasonable, oppressive and unconstitutional burdens upon interstate commerce as conducted by this carrier in that charges do and will exceed any proportionate benefit or advantage or protection to this carrier, and further, in that said taxes are not measured by and bear no fair relationship to the use of the highways for which the charge is made, in violation of the commerce clause of the Constitution of the United States, as hereinafter is more particularly pleaded.

That due to the sparsely settled character of the State of Montana and its relatively small populace, viz., 535,000 persons scattered over 146,000 square miles and due, further to the fact that vast districts are not populated to any

extent, and to great distances between populated centers, it is difficult to obtain a return load out of Montana because of the lack of business for this carrier originating in said state. The total miles traveled by carrier's motor vehicles in interstate commerce in Montana in 1937 and 1938 and for the first ten (10) months of 1939 did not equal the average mileage per year per truck throughout the United States of America for carrier's operations. The total number of days all trucks of carrier were in the State of Montana, traveling loaded or unloaded, averaged a little in excess of one truck per each day of these years; and the empty mileage traveled in the State of Montana in 1937 was 37%, in 1938 was over 42%, and for the first ten months of 1939, 40% of total mileage traveled in Montana against like percentage for the United States of 25%.

This carrier alleges that a fair and reasonable charge as compensation for the right of using the highways of the State of Montana in conducting its business in interstate commerce is much less than the per traveled mile cost set forth above. The amounts of money paid by this carrier for registration, license plates and gasoline excise highway debenture taxes, and the application of such funds to the highways of the State of Montana, including the Federal Aid Highway system, constitute and are more than a fair and just compensation to the State of Montana for the use of its highways by this carrier in its operations in interstate commerce. That said Board, by its action in making the said Order complained of herein, is attempting to prevent this carrier from exercising its right to engage in interstate commerce, as aforesaid, when this carrier has paid much more than a fair and reasonable compensation to the motor license department and the highway department of the State and for permission granted to so operate within the State in interstate commerce over the highways and is in fact endeavoring to tax this carrier directly for the privilege of operating in interstate commerce.

That during the year 1937 this defendant's vehicles traveled a total of 7,826,046 miles throughout the United States, [fol. 25] in 1938 a total of 8,348,558 miles and for the first nine months of the year 1939 a total of 6,818,501 miles; that the average cost for each of said traveled miles throughout the United States in said periods for license fees, gasoline taxes, commission permits, property taxes and all other

taxes, charges of every kind and character, was slightly less than 1¢ per traveled mile.

G

Taxes Demanded by Use of Alleged Compensation For Highway Use but Not Paid by Carrier

That the fees demanded by the plaintiff Board of this carrier, referred to in its order of September 19, 1939, to show cause, and in its order of October 9, 1939, purporting to terminate and cancel the said Montana Certificate or "Permit" No. 1354 of this defendant (Paragraph C of this Defense and Cross-Complaint and Exhibits "A" and "C" hereto attached) are:

(1) Those prescribed by Sections 16 and 17 of said Chapter 184 of the Session Laws of 1931, (now Sections 3847.16-3847.17, R.C.M. 1935), reading as follows:

"(a) In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of the public highways of this state, every motor carrier, as defined in this act, shall, at the time of the issuance of a certificate and annually thereafter, on or between the first day of July and the fifteenth day of July, of each calendar year, pay to the board of railroad commissioners of the state of Montana the sum of ten dollars (\$10.00), for every motor vehicle operated by the carrier over or upon the public highways of this state.

"Provided, that a motor carrier engaged in seasonal [fol. 26] operations only, where its said operations do not extend continuously over a period of not to exceed six (6) months in any calendar year, shall only be required to pay compensation and fees in a sum equal to one-half ($\frac{1}{2}$) of the compensation and fees herein provided, and provided further, that the compensation and fees herein imposed shall not apply to motor vehicles maintained and used by a motor carrier as standby or emergency equipment. The board shall have the power and it is hereby made its duty to determine what motor vehicles shall be classed as standby or emergency equipment.

"(b) When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the

making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state.

“(c) Upon the failure of any motor carrier to pay such compensation, when due, the board may in its discretion revoke the carrier's certificate or privilege and no carrier whose certificate or privilege is so revoked shall again be authorized to conduct such business until such compensation shall be paid.”

3847.17. “All of the fees and compensation charges collected by the board under the provisions of this act shall be transmitted to the state treasurer who shall place the [fol. 27] same to the credit of a special fund designated as ‘motor carrier fund’; such fund shall be available for the purpose of defraying the expenses of administration of this act and the regulation of the businesses herein described, and shall be accumulative from year to year. All expenses of whatsoever kind or nature of the board incurred in carrying out the provisions of this act shall be audited by the state board of examiners and paid out of the ‘motor carrier fund.’ Such fund shall not come within the restriction of any law of this state governing payment of expense incurred in a previous year, it being intended that such fund shall be applied to the payment of any necessary costs or expenses in carrying out the provisions of this act, whether incurred during the ensuing year or previous fiscal years, and such ‘motor carrier fund’ or accumulations thereof, are hereby appropriated for the payment of the costs and expenses rendered necessary in the carrying out of the provisions of this act.” and, in addition to the above,

(2) Those described by Sections 2 and 3 of Chapter 100, Laws of Montana, 1935, an Act approved March 14, 1935 (now Sections 3847.27 and 3847.28, R.C.M. 1935) reading as follows:

3847.27. “In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in

consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall between the first and fifteenth days of January, April, July and October of each year, file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of [fol. 28] one-half of one per cent of the amount of such gross operating revenue; provided, however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars (\$30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars (\$15.00)."

3847.28. "All fees collected from motor carriers shall be, by the commission, paid into the state treasury and shall be, by the state treasurer, placed to the credit of the motor carrier fund. All other fees and charges collected by the commission under the provisions of this act shall be by the commission paid into the state treasury and shall be by the state treasurer placed to the credit of a fund to be known as the 'public service commission fund', and the general and contingent expenses of the public service commission shall be by the state treasurer paid out of said public service commission fund upon presentation of duly verified claims therefor, which claims shall have been approved by the commission and audited by the state board of examiners."

G

That the attempt of the said Board to exact from this carrier the said Ten (\$10.00) Dollar "straight" or "flat" per truck fee provided by Sec. 16 of Chapter 184, Laws of Montana, 1931 (Sec. 3847.16, Revised Codes of Montana, 1935) by its said Order No. 1746 in Docket No. 3075, of October 9, 1939, assuming to deny this carrier all right to operate in interstate commerce over Montana highways accompanied by the threats of said Board to seize and im- [fol. 29] pound the trucks of carrier and to cause the arrest of drivers of said trucks and the institution of criminal proceedings against this carrier and said drivers if said

fees were not paid, is in excess of the statutory power and authority of said Board, and in contravention of the provisions of Sec. 23, Ch. 184, Laws 1931 aforesaid (Sec. 3847.23 Revised Codes of Montana, 1935, reading as follows:

3847.23 "The terms and provisions of this act shall apply to commerce with foreign nations, and to commerce among the several states of this Union, insofar as such application may be permitted under the provisions of the Constitution of the United States, treaties made thereunder and the acts of Congress; provided that it shall not be necessary for an interstate or international motor carrier, in order to obtain a permit as herein provided, to make any showing of public convenience and necessity, except as to the transportation of passengers and/or freight between points within this state, the power to regulate such operation being specifically reserved herein; and provided further, the board is hereby authorized to exercise any additional power that may from time to time be conferred upon the state by any act of Congress and provided further, that any motor carrier operating in and about any national park, whose rates and methods of accounting are controlled by contract with the United States, shall not be subject to any regulation by the commission in conflict with such contract or in conflict with any regulation by the United States made pursuant to such contract or made pursuant to an act of Congress of the United States." in that the application of said state license tax to this carrier engaged exclusively in interstate commerce is by the commerce clause of the Constitution of the United States confined to a fair [fol. 30] and reasonable charge as compensation for the use of the highways and the cost of actually regulating and policing the traffic charged, and on the face of said Ch. 184, Laws of Montana, 1931, all of the proceeds of said tax are made available not for highway construction, betterment or improvement, or for any highway use or for any regulation and policing of the traffic; but by the terms of said act for the purpose of defraying the expenses of administration of this act and the regulation of the businesses" described in the Act; and, further, in practise the proceeds of said tax are used and expended to pay the salaries of members of plaintiff Board and its ex-officio commissions as set forth in Paragraph "B" above, the salaries of the employees on the staffs of each, and the traveling and

administrative expenses, incident to the activities of the multiple powers invested in said board and its ex-officio commissions in the regulation of railroads, public utilities, pipe lines, public mills, public boats on navigable waters, oil pipe lines, gasoline inspection, and also merchants' prices and practices under the Unfair Practice Act. That the language of said Sections 16, 17 and 23 of said Chapter 184, Laws 1935, in the presence of the constitutional restrictions of the commerce clause of the Federal Constitution, and the practical administration of said Act by said Board demonstrate that said tax is not applicable to interstate commerce, and the operations of this carrier, and the present attempt by said Board to make it so by its construction aforesaid violates the said statute and will, unless enjoined, render the same unconstitutional and void. The said tax is, by the terms of Chapter 184, Laws 1931, applicable only, if at all, to motor carriers, to the operations of motor carriers as defined in said act, which are intrastate [fol. 31] in character, and relate and cover only motor carriers licensed by said Board for the transport of freight, goods, and commodities in intra-state commerce between points wholly within the State of Montana.

H

That if the said Ten Dollar "flat" or "straight" per vehicle tax provision must, by its terms, be construed to disclose a legislative intent to make it applicable to this carrier in interstate commerce, then and in such event, this carrier alleges:

(1) That said Sections 16 and 17, Chapter 184, Laws 1931 (now Sections 3847.16 and 3847.17, Revised Codes of Montana, 1935) violate the equal protection clause of the 14th Amendment to the Constitution of the United States, and further violate Sections 1 and 11 of Article XII of the Constitution of the State of Montana, requiring license taxes to be based on a fair and just classification and prohibiting arbitrary and discriminatory classification of the subjects thereof in that the attempt to impose a "flat" or "straight" per vehicle tax on every motor vehicle operated by a motor carrier over the public highways of Montana, without regard for whether said vehicles are operated by a Class A, Class B or Class C Motor carrier, as in said act defined and established, without regard to whether said

vehicle is operated in interstate commerce, or intrastate commerce, or in commerce at all, without regard for size, capacity, or weight, without regard to the effect in wear and tear, or other depreciation of said motor vehicle on the highways, without regard to the use or purpose of said motor vehicle, whether occasional or relatively continuous, without regard to the mileage, loaded or empty, traveled or covered by said motor vehicle on the highways, without [fol. 32] regard for the necessity of policing or regulating the said motor vehicle, or the traffic in which it may be engaged, without regard for the volume or nature of the traffic and the administrative labors, if any, related and responsive thereto, results in an arbitrary blanket classification of all motor carriers which ignores the essential, factual and realistic differences and distinctions between the members of said gross class.

(2) That the provisions of Section 1 of Chapter 184, Laws 1931 (now Section 3847.1, Revised Codes of Montana, 1935) exempting from the operation of said Act and said "straight" or "flat" Ten Dollar per vehicle tax—" . . . the transportation of freight . . . by motor vehicles when done occasionally and not as a regular business," or ". . . the transportation by means of motor vehicles in the regular course of business of employees, supplies and materials by any person, firm or corporation engaged exclusively in logging or mining operations, in so far as the use of employees, supplies and material in construction and production is concerned" are construed by said Board as not affording exemption to this carrier from the provisions of said act and as so construed, violate the equal protection clause of the 14th Amendment to the Constitution of the United States, and, further, violate Sections 1 and 11 of Article XII of the Constitution of the State of Montana, in that this carrier only occasionally transports freight by motor vehicle and not as a regular business over the highways of Montana; and, further, in that the transportation of logging or mining supplies and materials in construction and production, ever recurring incidents of major industry in Montana, makes a regular, burdensome, [fol. 33] hazardous and traffic interfering use of the highways of Montana and creates demands for regulation and policing of such traffic much greater in volume, in import and effect on highways and highway traffic than this car-

rier's occasional use of Montana highways in interstate commerce, to the distinct prejudice of this carrier and others similarly situated.

That if said Ten-Dollar "flat" or "straight" per vehicle license fee, as prescribed by Sec. 3847.16, R. C. M., 1935, must be construed as contended by said Board, i. e., as applicable to the operations of this carrier in interstate commerce into, out of, through and across the State of Montana, the said attempted license, fee or tax, is null and void in contravention of clause 3 of Section 8 of Article 1 of the Constitution of the United States of America, and in contravention of the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and in contravention of Section 27 of Article III of the Constitution of the State of Montana, in that:

(1) The said tax as laid, and as asserted by and through said Board of Railroad Commissioners, or otherwise, is in fact an attempt to lay a tax on the privilege of engaging in interstate commerce, and the State of Montana is without power to tax such privilege, and, as construed, Sec. 23 of said Act exhibits that said act and tax is hostile to, and destructive of, interstate commerce.

(2) The said tax as thus laid and construed, indiscriminately covers motor carriers both in intrastate commerce and in interstate commerce, is not apportioned on any basis, is not capable of separation, bears no relationship to the use of the highways for which the charge is made, thereby failing as a whole in its attempted application to the operation of this carrier.

(3) None of the said fees or taxes attempted to be collected by the Board of Railroad Commissioners of the State of Montana from this carrier and transmitted to the State Treasurer of the State of Montana and by him credited to the so-called "motor carrier fund" is appropriated by law, or in practise employed, for the construction, improvement or maintenance of any state highways or of any roads of the State of Montana or for policing and regulating highway traffic by motor carriers or any highway traffic or for which benefits this carrier or other similarly situated in its interstate commerce operations. That said Board is not authorized by the provisions of Chapter 184, Laws 1931, or any other law of the State of Montana, to

appoint or set up any inspectors, field men, or supervisors under and in connection with Chapter 184, laws 1931; and the attempted regulation of the business of motor carriers under the terms of said act is in no manner related to the use of the highways, or roads or any of them, of the State of Montana by motor carriers and all policing, regulating and inspecting of highway motor traffic is performed by the State Highway Department, the State Motor Vehicle Department and the State Highway Patrol, all of which departments and agencies are wholly separate from said Board of Railroad Commissioners, and no fees, taxes or revenues of the Board are or may be used by said departments or agencies. That, notwithstanding any recitals in said provisions for said Ten Dollar per motor vehicle tax covering compensation for use of the highways, the Legislative Assembly of the State of Montana has by law (House Bill No. 410, Laws 1939, approved March 17, 1939, appropriated all monies of the motor carrier fund for "carrying out all the duties of the Railroad and Public Service Commission (Montana Session Laws 1939, pp. 662 and 665.)

(4) That the total of said Ten Dollars (\$10.00) per [fol. 35] truck fees demanded of this carrier, is excessive and more than is reasonably necessary or proper to defray the permissible regulation and policing of this carrier's operations in Montana, or the expenses of the administration of the Act as respects this carrier's Montana operations if the same had any fair relationship to the use of the highways and this carrier asserts that no such relationship exists:

(5) That a reasonable charge to this carrier for the purpose of defraying the expenses of policing and regulating the business here involved by the Board of Railroad Commissioners is less than the amount demanded under said Ten Dollar per vehicle provision in that the presence of interstate motor carriers like Aero Mayflower on the highways of Montana occasions no hearings for certificates and a minimum of routine office recording, not exceeding for all such carriers the time of one man at \$125.00 per month for one month in each year.

(6) That the fees demanded for each of the years in question are in each instance more than the privilege is

worth. That in its essential nature the business of this carrier is occasional and intermittent, notwithstanding it makes as full use of the Montana highways as it can, all factors considered. It would be impossible and impracticable for carrier to allocate one or more pieces of its equipment to operate within the State of Montana only, as such an allocation would involve the transfer of loads at the State line both at the time the load was received by the truck allocated to Montana operations and at the time when the load was delivered to another truck to continue the journey. The expense of loading and unloading, and the delays involved would place an undue burden upon this carrier and its interstate commerce both as to expense and [fol. 36] time, and would also involve a vast increase in empty and unprofitable miles traveled by trucks within the State of Montana, rendering it impossible for this carrier to conduct its operations, and this carrier would be thereby and thus prevented from engaging or carrying on its business in any manner whatsoever over the highways of Montana, and this carrier alleges that the demands made upon it by the Board as hereinabove set forth in the aggregate, or separately considered,—unjust, unreasonable and unfair and are in violation of Section 1 of the 14th Amendment of the Constitution of the United States of America, and hostile to and destructive of interstate commerce over Montana highways, in violation of the commerce clause of the Constitution of the United States.

(7) That the fees attempted to be collected by defendant Board of Railroad Commissioners from this carrier under said Section 16 of Chapter 184 aforesaid, for each of said years, are in and of themselves excessive, exorbitant, unreasonable in amount, and constitute an undue and unjust burden on the interstate commerce transacted by this carrier; and further that said demanded fees, taken in connection with the fees already paid to the State of Montana for the registration of and license plates for its several vehicles during the periods in question, and by gasoline-exercise for highway debentures, constitute and are an unjust burden on the interstate commerce transacted by this carrier, in that they bear no reasonable relation to the privilege of user and are excessive for the declared purpose of administration.

That the said Board of Railroad Commissioners has under its intrastate jurisdiction in excess of fifty Class "A" operators, and in excess of fifty Class "B" operators [fol. 37] and in excess of four hundred and sixty Class "C" operators, carrying either freight and express or passengers and baggage or passengers and light freight and express, and the receipts from the collection of said Ten Dollar per vehicle license fee on said intrastate operators averaged, for the years 1937, 1938 and first ten months of 1939, \$12,500.00 per year and in each of the years 1937 and 1938, the said Board has carried over from said "motor carrier fund" to the succeeding fiscal year, an average unexpended balance of \$40,000.00 made up in part of said Ten Dollar license fees and partly of other moneys collected by defendant as gross operating revenue taxes under the provisions of Sections 3857.27 and 3847.28, R. C. M 1935, hereinafter referred to.

I

That the attempt of the Board of Railroad Commissioners of the State of Montana to exact from said carrier the Ten (\$10.00) Dollars per vehicle fee fixed by Secs. 16 and 17 of Chapter 184, Laws 1931, (Secs. 3847.16 and 3847.17, Revised Codes of Montana, 1935) by its said order No. 1746 in Docket No. 3075, of October 9, 1939, denying this carrier all right to operate in interstate commerce over Montana highways is unconstitutional, null and void in that said action violates the due process of law clause of the Fourteenth Amendment to the Constitution of the United States and the due process of law clause in Sec. 27 of Article III of the Constitution of the State of Montana in this particular:

The said Board and the individual members thereof wholly failed to make any findings of fact consequent on the proceedings in said Docket No. 3075 and proceeded to an order therein without making or serving upon this carrier at any time any proposed findings of fact or conclusions of law upon the record in said docket, and further said Board and members wholly ignored the uncontradicted, credible evidence of record before it, all of the evidence at said hearing being submitted by this carrier, fully establishing this carrier's right to operate in interstate commerce over Montana highways, free from any obligation to pay said fees.

J

That the further and additional attempt of said Board of Railroad Commissioners of the State of Montana, ex-officio the Public Service Commission of Montana, to collect and exact from this carrier, for and on account of its operations in interstate commerce as aforesaid, a fee of one-half of one per cent ($\frac{1}{2}$ of 1%) of the gross operating revenue of this carrier from all its business in the United States of America, subject to a stated annual minimum of \$15.00 for each vehicle registered and/or operated under the said Motor Carrier Act, Section 2, Ch. 100, Laws of Montana, 1935 (Sec. 3847.27 R. C. M. 1935) and the order of said Board No. 1746 in Docket No. 3075 in aid of said attempt is wholly unlawful, null and void, and beyond the statutory authority of said board, in that:

(a) The Public Service Commission of Montana is a statutory creature of the Legislative Assembly of the State of Montana possessing only the powers expressly granted or implied by law, and said commission has no jurisdiction, power or authority over motor carriers and by Sec. 3880, R. C. M. 1935, is excluded from any authority over motor carriers, and is without jurisdiction to grant certificates of convenience and necessity to motor carriers in any event.

(b) The said tax or fee, if applicable to the operations [fol. 39] of any motor carrier, is confined and is intended to be confined to the business of motor carriers operating only in intrastate commerce between points wholly within the State of Montana and, as such, is in no respect applicable to the strictly interstate operations of this carrier.

(c) This carrier is not a "motor carrier holding a certificate of public convenience and necessity issued by the Public Service Commission," and by the provisions of Sec. 23 of Ch. 184, Laws 1931, (Section 3847.23 Revised Codes of Montana, 1933) is exempted from any duty to obtain such a certificate from the parent Board of Railroad Commissioners and said act is wholly inapplicable to this carrier.

K

That if the so-called gross operating revenue tax with annual minimum prescribed by Secs. 2 and 3 of said Chapter 100, Laws of Montana, 1935 (now Sections 3847.27 and

3847.28 Revised Codes of Montana, 1935) is by its terms to be construed as applicable to the operations of this carrier in interstate commerce, and such statute is so construed by said Board of Railroad Commissioners, then the said Sections 3847.27 and 3847.28 Revised Codes of Montana, 1935, are, and each of them is, unconstitutional, null and void in that they violate Clause 3, Section 8, Article I of the Constitution of the United States of America and, in addition, the due process of law clause of the Fourteenth Amendment to the Constitution of the United States of America and, further, the due process of law clause of Section 27 of Article III of the Constitution of the State of Montana.

(1) Because such statutes attempt to burden motor carriers with part of the cost of the regulation of public [fol. 40] utilities within the State of Montana through the Public Service Commission of the State of Montana, which Commission, by the provisions of Sections 3879-3913, Revised Codes of Montana, 1935, is charged with the regulation of public utilities in the State of Montana, i. e., utilities privately owned or publically owned, distributing heat, street railway service, light, power in any form or by any agency, water for business, manufacture, household use or sewerage service, telegraph or telephone service to the general public, and none of the activities of the said Public Service Commission of the State of Montana is in any manner or respect related, directly or indirectly, to the regulation of the business of motor carriers over the highways of the State of Montana, or to the construction, maintenance, betterment and improvement of any roads or highways in Montana, or to the policing of the same or the traffic thereon, or to any regulation of motor carriers, and none of its activities is of any benefit or advantage to interstate motor carriers or has any relation to them or their use of the highways of Montana.

(a) This carrier has no operating revenues except those derived from interstate commerce. The state of Montana is without power, right or authority to impose said gross revenue tax upon the interstate business of this carrier for the declared purpose of the tax, for its real purpose, or for any purpose.

(b) The State of Montana is without right, power or authority to apply, exact or collect a highway privilege tax

indiscriminately applied to the aggregate gross revenues from both intrastate business and interstate business of motor carriers without regard for the substantial distinctions between the two types of businesses with respect to their use of the highways of Montana, and relation to the [fol. 41] declared purpose of regulation or real purpose of said taxation, and without apportionment, or basis of apportionment, so as clearly to exclude from its operation and effect the right of this carrier to engage exclusively in intrastate commerce over the highways of Montana on conditions permitted to the State, assuming that a gross revenue tax could under any circumstances bear any relation to compensation for highway use or proper state regulation.

(c) No part of the fees under said Sections are in truth or in practice, or by controlling legislative direction, exacted as compensation for the use of any of the highways of Montana by this carrier or for cost of policing the traffic of this carrier; such fees bear no relation whatsoever to the use of said highways, no part of them is to be used or is usable for the construction, improvement, repair or maintenance of any of the highways of Montana, or reasonably allocated for the regulation and policing of interstate traffic thereon, but on the other hand, by the express terms of said Act, all of said fees are paid into the State Treasury, to the credit of the Motor Carrier Fund, referred to in said Section 17, of Chapter 184 of the Laws of 1931; and by the legislative assembly of the State of Montana appropriated for "carrying out all the duties of the railroad and public service commission." (Montana Session Laws 1939, pp. 662 and 665.)

(4) The fee provided by said Sections purports to be equal to one-half of one percent of the amount of gross operating revenue of this carrier with the proviso that with respect to each Class "C" carrier, and said Board asserts such to be the classification of this carrier, a minimum annual fee shall be \$15.00 per each vehicle registered and/or operated under the Motor Carrier Act; such provision [fol. 42] wholly fails to make any distinction between gross receipts in interstate and those in intrastate commerce, and all of carriers gross operating revenues are from interstate commerce and hence the minimum of \$15.00 per truck is a direct burden on such commerce without warrant in law as aforesaid.

(3) The fees proposed to be exacted by the Board of Railroad Commissioners under this section constitute and are in fact an occupation tax, and therefore, are not applicable, assessable or collectible against this carrier who is engaged solely in interstate commerce.

(f) That said Sections 16 and 17 Chapter 184, Laws 1931 (now Sections 3847.27 and 3847.28, Revised Codes of Montana, 1935) violate the equal protection clause of the 14th Amendment to the Constitution of the United States and, further violate Sections 1 and 41 of Article XII of the Constitution of the State of Montana, requiring license or privilege taxes to be based on a fair and just classification and prohibiting arbitrary and discriminatory classification of the subjects thereof, in that the attempt to impose a gross revenue tax together with a "flat" or "straight" per vehicle minimum tax on every motor vehicle operated by a motor carrier over the public highways of Montana, without regard for whether the gross revenues derive solely from interstate or from intrastate commerce, or both, without regard for whether said vehicles are operated by a Class A, Class B or Class C Motor carrier, as in said act defined and established, without regard for size, capacity or weight, without regard to the effect in wear and tear, or other depreciation of said motor vehicle on the highways, without regard to the use or purpose of said motor vehicle, whether occasional or relatively continuous, without regard to the [fol. 43] mileage, loaded or empty, traveled or covered by said motor vehicle on the highways, without regard for the necessity of policing or regulating the said motor vehicle, or the traffic in which it may be engaged, without regard for the volume or nature of the traffic and the administrative labors, if any, related and responsible thereto, results in an arbitrary blanket classification of all motor carriers which ignores the essential, factual and realistic differences and distinctions between the members of said gross class and wholly and indiscriminately ignores, in particular, the permitted bases of state burdens on interstate motor vehicles and their interstate traffic.

L

This carrier alleges that both of said acts assuming to prescribe respectively (a) the Ten Dollar per vehicle "flat" or "straight" fee and (b) the 1 and ½% Gross Operating

Revenue fee with a "flat" or "straight" per vehicle minimum purport to declare that said exactions are levied "in consideration of the use of the highways in the state." That said declarations are of no force or effect, and gratuitous in character in that the further, express terms of both of said acts show upon the face thereof, that said exactions are for the purpose of securing revenues to carry on the whole motor vehicle administration of said Board in all phases and incidents. That, in addition, the Legislative Assembly of Montana has expressly appropriated all of the receipts from said exactions for "carrying out all the duties of the railroad and public service commission" in the multiple fields of administrative activity authorized by the Legislative Assembly, viz., in brief statement, regulation of railroads, steam and electric, express companies, sleeping car companies, freight line companies, all public utilities of every nature, in Montana, private or municipal, [fol. 44] flour mills, grain elevators, boats and pilots on navigable waters, oil pipe lines, producers, refiners and distributors of gasoline, fuel oil, lubricating oil, etc., merchants and sellers of commodities under the Unfair Practices Act, etc., etc.

That the roads and highways, and facilities thereof, furnished to the public by the State of Montana are, as to the State Highway System (commonly known as the "Federal Aid Highway System") used by this carrier constructed by the United States of America and the State of Montana, the United States bearing 55% of the cost of construction and the State bearing 45% of the cost of construction. That with respect to the maintenance of the State Highway System, and the construction and maintenance of all other roads and highways in Montana, the cost thereof is provided by the State of Montana. That in all cases the funds provided by the State of Montana are derived entirely from the Motor License and Registration Tax and the Gasoline license tax referred to in Paragraph "E" above and this carrier pays and discharges all of said license tax exactions for which it is liable and notwithstanding its occasional and intermittent use of the State Highway System (and no other States Roads or highways) as aforesaid.

M

This carrier alleges that it is not operating into, out of, through or across the State of Montana on the highways thereof in violation of Chapter 184, Laws 1931, but that it is operating, strictly in interstate commerce only, into, out of, through or across the State of Montana, under and pursuant to the provisions of the Federal Motor Carrier Act of 1935, in accordance with Permit No. 2934 issued by the Interstate Commerce Commission of the United States of America to [fol. 45] this carrier and the State of Montana is without authority to compel this carrier to apply for, receive or obtain from it a certificate of public convenience and necessity authorizing such operation, or to prohibit or interfere with this carrier in the conduct and carrying on of its interstate business over and upon the public highways of the State of Montana as its vehicles proceed into, out of, through or across said state, the Interstate Commerce Commission having exclusive authority in the premises under said Federal Motor Carrier Act of 1935.

Wherefore, this defendant and cross-complainant prays that said Report and Order No. 3075 of the plaintiff Board, dated October 9, 1939, be declared null and void, and as such be by the court vacated and set aside.

That Sections 3847.16, 3847.17, 3847.27 and 3847.28, R.C.M. 1935, if found applicable in terms to the interstate operations of this carrier into, across, through, or out of the State of Montana, be held and declared to be in violation of the commerce clause of the Constitution of the United States, and/or of the due process clause and/or of the equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States of America, and in violation of Sec. 27 of Article III of the Constitution of the State of Montana, as applied to the Interstate business of this carrier.

That said Board be permanently enjoined and restrained from enforcing or attempting to enforce any provision of its said Report and Order No. 3075 and of said statutes, or any of them, against this carrier and that said Board be permanently enjoined and restrained from interfering with, obstructing or in any manner prohibiting this carrier from using the highways of the State of Montana in interstate [fol. 46] commerce, for or on account of any matter or thing

in said Report and Order No. 3075 and said statutes contained.

E. G. Toomey, John W. Chapman, Toomey, McFarland & Chapman, Attorneys for Defendant and Cross-Complainant.

Emmett S. Huggins, of Counsel.

Duly sworn to by E. G. Toomey. Jurat omitted in printing.

[fol. 47] EXHIBIT "A" TO ANSWER OF DEFENDANT

Before the Board of Railroad Commissioners of the State of Montana.

In the Matter of Fees Owed by the Aero Mayflower Transit Company, a motor carrier.

Docket No. 3075

To Aero Mayflower Transit Company, Indianapolis, Indiana:

Whereas this Board who is charged with the administration of the Motor Carrier Act of this State has upon due investigation found that you, Aero Mayflower Transit Company of Indianapolis, Indiana, have been operating as a motor carrier for hire over the public highways of the State of Montana and are now operating as such motor carrier for hire over the public highways of the State of Montana relating to motor carriers by refusing to pay the fees required by the laws of the State of Montana as required of motor carriers under the laws of the State of Montana, and are now operating as a motor carrier for hire over the public highways of the State of Montana without complying with the laws of the State of Montana relating to motor carriers by refusing to pay said fees though various demands have been made by this Board upon you, Aero Mayflower Transit Company, to pay the fees owed by you to the State of Montana according to the laws of the State of Montana for your operations as a motor carrier over the public highways of the State of Montana and you, Aero Mayflower Transit Company, have refused and now refuse

to conform to said demands in making payment of said fees to the state of Montana.

Now, therefore, this Board being fully advised in the premises does hereby order you, Aero Mayflower Transit Company of Indianapolis, Indiana, to appear before this Board at its offices in the Capitol Building, Helena, Montana, on October 6, 1939, at 10:00 A. M. of said day and show [fol. 48] cause if any you have why any right or rights, permit or permits granted you by this Board to operate as a motor carrier over the public highways of the State of Montana should not be revoked and cancelled by this Board because of your non-compliance with the laws of the State of Montana relating to motor carriers as heretofore set forth as stated.

Done by order of the Board of Railroad Commissioners of the State of Montana this 19th day of September, 1939.

Paul T. Smith, Commissioner, Horace F. Casey,
Commissioner, Austin B. Middleton, Chairman.

Attest: Official.

John W. Bonner, Secretary and Counsel. (Seal)

EXHIBIT "B" TO ANSWER OF DEFENDANT

THE STATE OF MONTANA

Before the Board of Railroad Commissioners of the State of Montana.

In the Matter of Fees Claimed from Aero Mayflower Transit Company.

Docket #3075

RETURN TO ORDER TO SHOW CAUSE

In answer and return to the order issued by this Board under day of September 19, 1939, directing the Aero Mayflower Transit Company to appear before it on October 6, 1939 to show cause, if any, why any right or rights, permit or permits, granted it by this Board to operate as a motor carrier over the public highways of the State of Montana

should not be revoked and cancelled, and Aero Mayflower Transit Company respectfully submits:

1. That Aero Mayflower Transit Company is, and has been at all times involved herein, a corporation with its principal office in the City of Indianapolis, State of Indiana, [fol. 49] operating a fleet of motor trucks engaged solely in the transportation by motor truck of used household goods and office fixtures throughout the several states of the United States; that it is now and has been at all times since the effective date of the Federal Motor Carrier Act operating throughout the United States in such capacity under and pursuant to a permit granted by Interstate Commerce Commission and under and pursuant to the grandfather clause of said Federal Motor Carrier Act; that such operations of this respondent as affect the State of Montana are wholly interstate in character; that this company is not now doing and has not at any time done any intrastate business within the State of Montana. In 1935 this respondent was granted a Type "C" Permit by the Board of Railroad Commissioners of the State of Montana.

2. That all trucks of this corporation circulate throughout the United States as the business demands; that no trucks are allocated to any particular State or section of the United States; a shipment of household goods and used office furniture is incident to the change of residence of the owner, is somewhat seasonal in its nature, and in view of the general character of the business, the operations of this company cannot be operated and are not being operated on any regular schedule or over any regular route. That all of the trucks are licensed in and bear the license plates of the State of Montana; that the State of Indiana has now and has had for several years in effect a statute creating a "reciprocity Commission", which commission is authorized to enter into a reciprocal contract and agreement with any like commission or properly authorized body in any other state in the United States as may be deemed proper, expedient, fair and equitable to citizens of each state involved, [fol. 50] with a view to promoting and establishing such fair, just, equitable and reciprocal agreements for the licensing, movement, taxing, registration, regulation and fees to be charged by each state against motor vehicles of the other states to any such agreement; that such Reciprocity Com-

mission of the State of Indiana is and has been at all times ready and willing to enter into an agreement with the State of Montana whereby these properly licensed trucks of each state shall be exempt from the payment in the other states to such agreement of license fees, taxes, Public Service Commission Fees and all other such fees; this respondent believes that such a reciprocity agreement between the State of Montana and the State of Indiana should be entered into, by the terms of which motor vehicles, properly licensed under the State of Montana, operating in the State of Indiana, would be exempt from fees of the character now claimed by the State of Montana against this respondent and this respondent would be exempt from the payment of the fees now demanded by the State of Montana.

3. That under and pursuant to the provisions of the Federal Motor Carrier Act approved by the President on August 9, 1935, Congress gave to Interstate Commerce Commission the exclusive authority to pass upon the application of a motor carrier engaged exclusively in interstate commerce on the highways for a Certificate of Public Convenience and Necessity, and such act of Congress superceded state legislation.

Southwestern Greyhound Lines vs. Railroad Commission, 99 SW 2nd 263.

Northern Pac. Oil Co. vs. State of Washington, 22 S. U. S. 370.

Erie Oil Co. vs. People of State of New York, 233 U. S. 671.

[fol. 51] This respondent understands and believes that the fees now demanded by your Honorable Board are those specified in Section 3847.16 Revised Codes of Montana, 1935, providing for the payment to your Board of the sum of Ten Dollars per annum for every motor vehicle operated by the carrier over or upon the public highways of Montana, and Section 3847.27 Revised Codes of Montana, 1935, providing that in addition to all other licenses, fees and taxes imposed upon motor vehicles in your State, every motor carrier holding a Certificate of Public Convenience and Necessity shall between the 1st and 15th days of January, April, July and October of each year, file with the Public Service Commission, a statement showing the gross operating revenue of such carrier for the preceding three months

of operation and shall pay to the Board a fee of one-half of one percent of the amount of such gross operating revenue, provided, however, that the minimum annual fee which shall be paid by each Class "C" carrier for each vehicle registered and/or operated under the motor carrier act shall be Fifteen Dollars. Under both such blanket sections of the Montana statutes, all fees collected from motor carriers are paid into the State Treasury and placed to the credit of the "Motor Carrier Fund". The first cited section provides that such funds shall be available for the purpose of defraying the expenses of administration of the act and the regulation of the business and shall be accumulative from year to year. There is no provision that any part of the funds shall be used for maintenance and improvement of the roads nor is it apparently contemplated that it will all be used in defraying the expenses of administration. Both sections of the statute quoted, or referred to, purport to require fees to be paid in consideration of the use of the highways. This, however, is not determinative of their validity. Charges imposed on the theory of compensation for use of the roads must either bear a reasonable relation to the actual use of the roads or be used for highway purposes; neither of the above sections of the statute limits the cost of administering regulations, the fees are not levied for highway purposes and are in no way based upon actual use of the highways. The specific provision in the first cited statute that the fund is to be available for the purpose of defraying the expenses of administration of the act and the regulation of the business negatives any intention to use these monies for highway purposes and would preclude this Board from making any contention that it is to be used; if excessive for the purpose of paying such expenses it is necessarily invalid. In support of the invalidity of this Ten Dollar per truck charge the respondent relies upon:

- ✓ *Strout vs. South Bend*, 277 U. S. 163 and cases cited;
- Ingels vs. Mors*, 300 U. S. 290;
- Interstate Transit, Inc. vs. Lindsey*, 283 U. S. 183.

In no case decided by the Supreme Court of the United States has such a tax been upheld as compensation for use of the highways unless it was either apportioned to actual use or actually devoted to highway purposes.

The fees sought to be collected under the provisions of Section 3847.27 of the Montana Code of 1935 are based solely on the amount of operating gross revenue; the respondent has no operating revenue other than that derived from interstate commerce; consequently any tax imposed on its gross revenue whether on the basis of a percentage or a fixed minimum is necessarily a tax imposed on revenue derived from interstate commerce; the State of Montana [fol. 53] has no power to impose a tax based upon receipts derived from Interstate commerce.

J. D. Adams Mfg. Co. vs. Storen, 304 U. S. 307.

The proposed tax on gross operating revenue is in an arbitrary minimum; it is not based on any actual revenue. A fair interpretation of the language in this section leads to the conclusion that these fees sought to be collected relate only to intrastate business, none of which is done by this respondent in the State of Montana. A charge cannot be exacted by the state for the privilege of engaging in interstate commerce.

Sprout vs. South Bend, *supra*;
Interstate Transit vs. Lindsey, *supra*;
Ingels vs. Mors, *supra*.

In the case of *Gwin, White and Prince vs. Henneford* (Jan. 3, 1939) 83 L. Ed. 276, a tax on the gross income of all persons engaging within the State in any business activity was held invalid as applied to income derived from interstate commerce. The Court said:

"Here the tax measured by the entire volume of the Interstate Commerce in which appellant participates is not apportioned to its activities within the state. A portion of this fee to exact such a tax other states to which the commerce extends may with equal right lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. Thus such a multiplication of state taxes each measured by the volume of the commerce would reestablish barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden [fol. 54] depends upon its nature measured in terms of its capacity to obstruct interstate commerce and

not on the contingency that some other state may first have subjected the commerce to a light burden."

In addition to the fees sought from respondent for each truck operated into, out of or through the State of Montana, your Honorable Board should give consideration also to the fees attempted to be exacted under Section 1760.7 of the Montana Statutes by which it is required that before any foreign licensed motor vehicle shall be operated on the highways of Montana for compensation or profit, or be used by the owner thereof while engaged in gainful occupation or business enterprise in the State of Montana, the same shall be registered and licensed in the same manner as domestic owned vehicles. Under and pursuant to the provisions of such section the Motor Vehicle Department of the State of Montana is demanding that each vehicle of the respondent which enters the state be licensed under the laws of Montana. The language in this section is believed by the respondent herein to relate only to foreign owned motor vehicles doing intrastate business in that the language refers to "gainful occupation or business enterprise in the state of Montana;" "In the state of Montana" is identical in its meaning as "within the state of Montana". Irrespective of whether such license fees relate to wholly interstate operations or those of a foreign vehicle owner operating wholly within the state of Montana the fact remains that under this statute in question the charge made is in no way measured by actual use of the highways nor does it on its own face purport to be exacted as a consideration for the use of the highways. It is unrelated to the public safety. There is no provision that it be used [fol. 55] for the maintenance of State and Federal highways which are used by the respondent almost entirely. The respondent's use of city streets and county roads to which these fees are applicable is inconsequential. In this respect there is a vast difference between the rights of the state with reference to intrastate commerce, where the taxing power may be involved and interstate commerce where it cannot be. This was plainly recognized by the Supreme Court of the United States in *Carley and Hamilton vs. Snook*, 281 U. S. 66.

4. The respondent admits that during the year 1937, twenty-five different pieces of its equipment came into,

out of or went through the State of Montana; it understands your commission is claiming twenty-six different pieces of equipment, but it appears that #3867 is listed twice on the Bill of Particulars furnished by your commission and it should be listed but once; the total miles traveled into or through Montana in the year 1937 was 37,265; of such total of twenty-five pieces of equipment, six pieces of such equipment made only one trip each into, out of or through the State of Montana, ten different pieces of equipment made two trips each, one made three trips, three made four trips, two made five trips and three made eight trips, during the year 1937; the total number of days or parts of days during the year 1937 that all such equipment made any use of the highways of Montana was 227 days, or an average use per day of the Montana highways throughout the year 1937 by any single piece of equipment of this respondent being 8 days;

In the year 1938 there were forty different pieces of equipment of this respondent which went into, came out of, or went through the State of Montana, although by duplication it is believed your records show forty-one such pieces of equipment; the total miles traveled insofar as Montana [fol. 56] is concerned during 1938 was 62,986; the total number of days all such equipment were using the highways of Montana was 385 or an average of less than 9 days per year per piece of equipment; of the forty pieces of equipment using the Montana highways in 1938, ten made one trip each, ten made two trips each, eight made three trips each, five made four trips each, one made five trips, one made six trips, one made seven trips, three made eight trips each, and one made fifteen trips, into, out of, or through the State of Montana.

For the first eight months of the year 1939, ending August 31, 1939, thirty-two different pieces of equipment belonging to this respondent made a trip into, out of or across the State of Montana; the total miles traveled during that period were 49,165, the total days all pieces of equipment, insofar as Montana is concerned, were 307; eleven such pieces of equipment made one trip each, six made two trips each, four made three trips each, seven made four trips each, one made five trips, two made six trips each and one made seven trips.

That in view of the above and foregoing facts it clearly appears that the demanded fee of Ten Dollars per truck

and the \$15.00 minimum predicated on gross revenues per truck, which fees apply alike under the statute to daily users of the Montana highways as well as occasional users, are highly excessive and burdensome on this respondent especially when it is borne in mind that its operations insofar as the State of Montana is concerned are highly interstate.

5. That if the fees demanded by your Honorable Board for the year 1937 approximating \$600.00 be paid, the same in addition to the \$613.25 paid to the State of Montana for license plates and permits for its several pieces of equip- [fol. 57.] ment, the total of all such sums will approximate three cents per traveled mile into, out of or through the State of Montana for said year. That if the demanded fees of approximately \$990.00 now be paid to your Board for the respondent's operations in 1938, the same, together with the sum of \$1077.25 paid in 1938 to the State of Montana for license plates and fees on its equipment will approximate a total of \$2050.00 or slightly more than three cents per traveled mile in Montana; that this respondent during the year 1939 has paid to the State of Montana for license plates and permits on its several pieces of equipment the sum of \$1472.50; that that sum together with the fees demanded of the Honorable Board on the same pieces of equipment will mean a total sum which will average better than three cents per mile traveled into, out of or through the State of Montana. That such a cost of three cents or more per traveled mile in Montana or any other state is an excessive cost and constitutes a burden on interstate commerce, especially when it is borne in mind that a substantial part of such fees so paid is not collected for the use or maintenance of highways and the remainder is not used on main highways but only on city streets and minor county roads. In addition to fees already paid and those demanded it must be borne in mind that this respondent buys many gallons of gasoline in the State of Montana during its operations throughout the year.

The respondent's motor vehicles cover on the average per year more than fifty thousand miles each, throughout the United States. The respondent respectfully submits that it wants to abide by all of the reasonable laws, rules and regulations of each State in the Union and that it has not sought at any time to evade or avoid the payment of

any reasonable legal fees demanded by the State of Montana; it respectfully submits and reiterates that the fees demanded by your Honorable Board are not legal and valid; considering the nature and extent and character of the operations of this respondent into, out of and through the State of Montana. This respondent submits that in the absence of any statute valid as to its operations, no tax is due from it for its operations into, out of or through the State of Montana; it agrees that in equity it should pay something to the State of Montana for the use it makes of the Montana highways. It believes that a fair charge for the use of the highways of Montana by it would approximate one cent per traveled mile. This respondent has heretofore offered to try to compromise this matter and it is now willing to try to compromise the matter. It believes that a fair compromise payment to the State of Montana would be the purchase by it of a limited number of truck license plates of Montana for the year, under which any and all pieces of equipment would have the use of the Montana highways in its interstate operations only. It believes that it has already paid the State of Montana more than a fair and equitable charge for the use it has made of the Montana highways during the years 1937, 1938 and 1939 and it therefore respectfully submits there is no justification for the demand for additional fees of your Honorable Commission.

This respondent further respectfully submits that if your Honorable Commission, upon further consideration of this whole matter, still believes that the fees it has demanded for the years in 1937 and 1938 and for the year 1939 are due from this respondent, your Commission should not cancel the permit or permits heretofore granted such respondent but that on the other hand the whole matter should be held in abeyance until a suit can be instituted [fol. 59] by this respondent to determine its rights in the premises; and this respondent now offers to post with your commission a bond in a sum sufficient to cover the fees demanded, executed by some reliable surety company, and agrees to institute within a reasonable time hereafter an action against your Commission and other officers of the State of Montana in a proper court of record, either as a declaratory judgment action or otherwise, in which the questions involved herein will be litigated; the respondent wants to state further however that it is not seeking litiga-

tion in this matter; it is seeking a fair interpretation of the laws of Montana with respect to the Federal Motor Carriers Act and with respect to the Commerce Clause of the United States Constitution and it is willing to be fair in its attitude toward the State of Montana.

STATE OF INDIANA,

County of Marion, ss:

Emmett S. Huggins, being duly sworn upon his oath says that he is and has been at all times mentioned in the above and foregoing return to order to show cause, the duly elected, qualified and acting Secretary of Aero. Mayflower Transit Company, the respondent in the above and foregoing; that he has examined the books and records of the respondent and now says that the matters and things therein stated are true to the best of his knowledge and belief as shown by said records and books.

Emmett S. Huggins.

Subscribed and sworn to before the undersigned Notary Public in and for said County and State, this 29th day of September, 1939. My Notarial Commission will expire 6-24-1942. John L. Hunn, Notary Public. (Notarial Seal.)

[fol. 60] EXHIBIT "C" TO ANSWER OF DEFENDANT

Before the Board of Railroad Commissioners of the State of Montana

Docket No. 3075. Order No. 1746

In the Matter of Fees Owed by the AERO. MAYFLOWER TRANSIT COMPANY, a Motor Carrier

APPEARANCES:

E. G. Toomex, Attorney, Helena, Montana, for Aero Mayflower Transit Company.

John W. Bonner, Counsel, for the Board.

It appearing to this Board that the Aero. Mayflower Transit Company of Indianapolis, Indiana, having made its return on October 6, 1939 at 10 o'clock A. M. of said day before this Board in its offices in the Capitol Building,

Helena, Montana, in response to the Order to Show Cause heretofore issued by this Board in this Docket to the Aero Mayflower Transit Company why any right or rights, permit or permits granted by this Board to said Aero Mayflower Transit Company to operate as a motor carrier under the laws of the State of Montana should not be cancelled for the nonpayment of fees owed by said Aero Mayflower Transit Company to the State of Montana under the laws of the State of Montana and rules and regulations of this Board.

And it further appearing to this Board that no good and legal reason exists why said fees should not be paid the State of Montana under the laws of the State of Montana by the Aero Mayflower Transit Company because of its operations as a motor carrier over the public highways of the State of Montana, and this Board after due consideration and deliberation and after being fully advised in the premises;

Does Hereby cancel, revoke and extinguish Permit No. 1354, heretofore issued by this Board on October 3, 1935 to Aero Mayflower Transit Company authorizing it to [fol. 61] transport property over the public highways of the State of Montana as a motor carrier because of said Aero Mayflower Transit Company refusing to pay to the State of Montana fees owed by it under the laws of the State of Montana and the rules and regulations of this Board because of its operations as a motor carrier over the public highways of the State of Montana.

Done in open session, at Helena, Montana, this ninth day of October, 1939.

Paul T. Smith, Commissioner. Horace F. Casey,
Commissioner. Austin B. Middleton, Chairman.

Attest: Official. John W. Bonner. Secretary and Counsel. (Seal.) (Filed Mar. 11, 1940.)

IN THE DISTRICT COURT, SILVER BOW COUNTY.

DEMURRER—Filed March 25, 1940

Come now the plaintiffs and cross-defendants, Board of Railroad Commissioners of the State of Montana, Paul T. Smith, Horace F. Casey and Austin B. Middleton, as members of and constituting the Board of Railroad Commissioners of the State of Montana, and each of them, and demurs to the so-called further and affirmative defense and cross-complaint contained in the answer herein upon the following grounds:

I

That the defense consisting of new matter contained in the further affirmative defense and cross-complaint in the answer is insufficient in law upon the face thereof.

II

That the counter-claim contained in the further and affirmative defense and cross-complaint in the answer is [fol. 62] insufficient in law upon the face thereof.

III

That the counter-claim contained in the further and affirmative defense and cross-complaint in the answer is not of the character specified in Section 9138 of the Revised Codes of the State of Montana, 1935.

IV

That the defendant and cross-complainant has not legal capacity to recover upon the counter-claim contained in its further and affirmative defense and cross-complaint in the answer in that defendant and cross-complainant is without right in law to set aside the discretionary power of plaintiffs and cross-defendants but if so must institute a separate and distinct action for so doing.

Plaintiffs and Cross-Defendants, Board of Railroad Commissioners of the State of Montana, Paul T. Smith, Horace F. Casey and Austin B. Middleton, as Members of and Constituting the Board of Railroad Commissioners of the State of Montana, and Each of Them, Demurs to the Answer of

Defendant and Cross-Complainant on File Herein Upon the Following Grounds:

I

That the answer does not state facts sufficient to constitute a defense or counter-claim.

Done and dated this 23rd day of March, 1940.

Harrison J. Freeburn, Attorney General of the State of Montana. John W. Bonner, Counsel for Board of Railroad Commissioners of the State of Montana.

Service of the foregoing demurrer admitted and a true copy of the same received this 22nd day of March, 1940.

[fol. 63] Toomey, McFarland & Chapman, Wilbur H. Wood, Attorneys for Defendants and Cross-Complainant.

IN THE DISTRICT COURT, SILVER BOW COUNTY

ORDER OVERRULING DEMURRER OF PLAINTIFFS TO THE FURTHER AND AFFIRMATIVE DEFENSE AND CROSS-COMPLAINT CONTAINED IN THE ANSWER OF DEFENDANT—Filed November 19, 1942

The demurrer of plaintiffs to the further and affirmative defense and cross-complaint contained in the answer of defendant herein heretofore came regularly on for hearing before the court, said plaintiffs being represented by counsel, Enor K. Matson, Esq., and said defendant being represented by counsel, E. G. Toomey, Esq. Thereupon, the matter was submitted for consideration and decision on briefs to be handed in by said counsel and was by the court taken under advisement.

The court being now fully advised in the premises as to the law, it is ordered that said demurrer be and the same is overruled and said plaintiffs are given thirty days to reply to said further and affirmative defense and cross-complaint. The said plaintiffs are granted an exception to the ruling of the court and thirty days to prepare, serve and file a bill of exceptions.

The court believes it accords with safer and better procedure to let the said affirmative defense and cross-complaint

stand, particularly so as it claimed therein in effect that a federal question is involved in the controversy.

Done in open court this 19th day of November, 1942.

[fol. 64]

Jeremiah J. Lynch, Judge.

IN THE DISTRICT COURT, SILVER BOW COUNTY

REPLY AND ANSWER—Filed February 19, 1943

Come now the plaintiffs and cross-defendants in the above entitled action and for their reply to the answer of defendant and cross-complainant admit, deny and allege:

I

Deny each and every allegation of paragraph I of the answer.

And for their answer to the further and affirmative defense and cross-complaint, plaintiffs and cross-defendants admit, deny and allege:

I

Admit the allegations of Sections A, B and C of said further and affirmative defense and cross-complaint.

II

Allege that they do not have sufficient knowledge or information to form a belief as to the truth of the allegations contained in Section D thereof and, therefore, deny each and every allegation, matter and thing therein contained.

III

Allege that they do not have sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph (1) of Section E and therefore, deny each and every allegation, matter and thing therein, except admit that any money paid by the defendant and cross-complainant as therein alleged, if any, was paid, ap-[fol. 65] propriated and allocated as in said statutes provided for the construction, repair and maintenance of highways in the State of Montana.

IV

Allege that they do not have sufficient knowledge or information to form a belief as to the truth of the allegations contained in Section E and each paragraph thereof beginning with paragraph (2), and, therefore, deny each and every allegation, matter and thing therein, except admit the enactment of and the provisions of Chapter 95 of the Laws of Montana, 1931, and specifically deny each and every allegation, matter and thing contained in that part of the fourth paragraph thereof beginning with the words in the eighth line thereof "that such charges so collected by said department", and ending at the end of the paragraph with the words "as hereinafter is more particularly pleaded", and specifically deny each and every allegation, matter and thing contained in the sixth paragraph thereof beginning with the words "This carrier alleges that a fair and reasonable charge as compensation", and ending with the words "and the privilege of operating in interstate commerce", at the end of said paragraph.

V

Admit the allegations of Section F thereof.

VI

Deny each and every allegation, matter and thing contained in Section G thereof, except admit the use of a part of the proceeds of the said tax authorized to be collected by Section 16 of Chapter 184, Laws of Montana, 1931, (Section 3847.16, Revised Codes of Montana, 1935), as therein alleged, but allege that the language of said section and the act of which it is a part unmistakably discloses the [fol. 66] intention of the Montana Legislature, in enacting the same, to require of the defendant and cross-complainant payment of the compensation for the privilege of operating its vehicles for the transportation of property for hire over the roads and highways in the State of Montana; that the right of the State of Montana to collect such fees as provided by said statute is not dependent upon whether the State of Montana in the conduct of its fiscal affairs chooses to use a part or all of the proceeds of such fees for purposes other than the construction, improvement or maintenance of its highways and that the use to which the proceeds of such fees are put by the

*State of Montana is not a matter which concerns the defendant and cross-complainant, which at all times, upon payment of the fees required to be paid by said Chapter 184, Laws 1931, has been and will be granted the privilege of operating its vehicles for the transportation of property for hire over the highways of the State of Montana.

VII

Deny each and every allegation, matter and thing contained in Section H and each of the paragraphs thereof, except admit the appropriation by House Bill No. 410, Laws 1939, and admit the allegations of the last paragraph thereof beginning with the words "that the said Board of Railroad Commissioners", and ending with the words "hereinafter referred to", but allege that the language of Chapter 184, Laws 1931, including Section 16 thereof and all amendments thereto, unmistakably discloses the intention of the Montana Legislature, in enacting the same, to require of the defendant and cross-complainant payment of compensation for the privilege of operating its vehicles for the transportation of property for hire over the roads [fol. 67] and highways in the State of Montana; that the right of the State of Montana to collect such fees as provided by said statute is not dependent upon whether the State of Montana in the conduct of its fiscal affairs chooses to use a part or all of the proceeds of such fees for purposes other than the construction, improvement or maintenance of its highways and that the use to which the proceeds of such fees are put by the State of Montana is not a matter which concerns the defendant and cross-complainant, which, at all times, upon payment of the fees required to be paid by said Chapter 184, Laws 1931, has been and will be granted the privileges of operating its vehicles for the transportation of property for hire over the highways of the State of Montana.

VIII

Deny each and every allegation, matter and thing contained in Section I thereof and allege that the plaintiffs and cross-defendant either expressly or by necessary implication made all findings of fact and conclusions of law upon which they found or based their order No. 1746 in said Docket No. 3075; that the non-payment of the said

✓ fees mentioned in Chapter 184, Laws 1931, required to be paid by defendant and cross-complainant, the subject of this controversy, was admitted by said defendant company in its "Return to Order to Show Cause" in said Docket No. 3075 as set out in Exhibit "B" attached to the answer and cross-complaint herein and made a part thereof and is admitted by the further and affirmative defense and cross-complaint; that neither in its said Return nor herein has defendant and cross-complainant claimed or asserted that it has paid such fees; that any failure, if any, by this Board to make specific findings of fact in Docket No. 3075 has been waived by the said defendant and cross-complainant and such failure, if any, [fol. 68] cannot now be made the subject of collateral attack in this proceeding.

IX

Deny each and every allegation, matter and thing contained in Section J thereof.

X

Deny each and every allegation, matter and thing contained in Section K thereof, except admit the provisions of Section 17 of Chapter 184, Laws 1931, and admit the appropriation made by the legislative assembly of the State of Montana, but allege that said Chapter 184, Laws 1931, properly and correctly construed does not require the payment of a gross revenue upon all of the interstate revenue or commerce of the defendant and cross-complainant, but requires payment only of that portion of the revenue or commerce of said company carried on within the State of Montana; that ever since the enactment of said Chapter 184 the plaintiffs and cross-defendants and their predecessors in office have continuously and consistently construed the same in this manner, which construction has not heretofore been challenged by anyone or repudiated by the courts in Montana; and that at no time have the plaintiffs and cross-defendants demanded or required of defendant and cross-complainant that it pay a gross revenue fee upon all of its interstate commerce or more than upon that portion of such revenue or commerce of said company carried on within the State of Montana.

XI

Admit that said acts declare that the fees required to be paid thereby are "in consideration of the use of the highways of the state" as alleged in Section L thereof, but deny each and every other allegation, matter and thing [fol. 69] contained therein, except admit the appropriation made by the legislative assembly of Montana as alleged in the first paragraph thereof and admit that the State of Montana pays 45 per cent of the cost of the construction of the state highway system of the State of Montana and pays the cost of construction and maintenance of all the roads and highways in Montana.

XII

Deny each and every allegation, matter and thing in Section M thereof.

XIII

Deny each and every allegation, matter and thing in said answer and cross-complaint not herein specifically admitted, qualified or denied.

Wherefore, having fully replied to and answered the answer and cross-complaint filed herein, prays that cross-complainant take nothing by its answer and further and affirmative defense and cross-complaint and that the same be dismissed and that the plaintiffs be granted the relief prayed for in its complaint.

R. V. Bottomly, Attorney General of the State of Montana; Enor K. Matson, Counsel, Board of Railroad Commissioners of the State of Montana and Special Assistant Attorney General; Attorneys for Plaintiffs and Cross-Defendants.

Duly sworn to by Austin B. Middleton. Jurat omitted in printing.

[fol. 70] Service of the within Reply and Answer, and receipt of copy thereof, this 17th day of February, 1943, is hereby admitted.

Toomey, McFarland & Hall, Attorneys for Defendant and Cross-Complainant.

IN THE DISTRICT COURT, SILVER BOW COUNTY

MOTION TO STRIKE—Filed November 1, 1943

Comes now the Defendant Aero Mayflower Transit Company, a corporation, and moves the court to strike from Paragraph X of the "Reply and Answer" of Plaintiff, all of lines 22 through and including line 30 of said Paragraph X on page five (5) of said Reply and Answer inclusive, and all of lines 1 through 8, inclusive, on page 6, of said [fol. 71] answer, for the reasons:

1. That said allegations are surplusage,
2. That said allegations are immaterial,
3. That said allegations are irrelevant, in that (a) the construction attempted to be placed on the provisions of Chapter 184, Laws 1931, by said allegations contradicts the terms of said Chapter (b) the validity of the Chapter is to be determined by what may be done under its terms, and not by what the Board actually does in administration of the Chapter (c) the attempted construction represents and is an attempt by the Board to amend the statute to save it from manifest invalidity, by additions and qualifications within the legislative province only and (4) in that the minimum tax of \$15.00 exceeds the $\frac{1}{2}$ of 1% tax on gross revenues of Defendant arising from any segregation or pro-ration of interest revenues accruing from interstate operations involving Montana.

Toomey, McFarland & Hall, Attorneys for Defendant.

IN THE DISTRICT COURT, SILVER BOW COUNTY

REPLY OF DEFENDANT TO "REPLY AND ANSWER" OF PLAINTIFF—Filed November 2, 1943

Comes now the defendant Aero Mayflower Transit Company and for its reply to the answer of Plaintiff to the further and affirmative defense and cross-complaint of defendant, denies as follows:

I

Denies all of line 7 through 25 of paragraph VI of said [fol. 72] answer of page three thereof.

II

Denies all of lines 5 through 22 of paragraph VII of said answer on page 4 thereof.

III

Denies all of paragraph VIII of said answer, except that Defendant admits the allegations in lines 24 and 25 thereof on page 4 of said answer.

IV

Denies all of lines 22 through 30, inclusive, of Paragraph X of said answer of page 5 thereof and all of lines 1 through 8 inclusive on page 6 of said answer.

E. G. Toomey & E. M. Hall, Toomey, McFarland & Hall, Attorneys for Defendant.

Only sworn to by E. S. Wheaton. Jurat omitted in printing.

[fol. 73] IN THE DISTRICT COURT, SILVER BOW COUNTY

MINUTE ENTRY OF TRIAL—November 2, 1943.

This day, this cause coming on regularly for trial, plaintiffs being present and represented by counsel, E. K. Matson, Esq., and the defendant being represented by counsel, E. G. Toomey, Esq. Thereupon, upon agreement of counsel for the respective parties, causes numbered 38175 and 38265 were by the court ordered tried jointly. Thereupon the motion to strike from the reply of plaintiffs in cause numbered 38175 was by the court denied.

Thereupon, after testimony on the part of the respective parties being heard and submitted, the said matter was submitted to the court on briefs. Thereupon counsel for the respective parties requested the court to make written findings of fact and conclusions of law, and the said matter was by the court take under advisement.

IN THE DISTRICT COURT, SECOND JUDICIAL DISTRICT, MONTANA,
SILVER BOW COUNTY

Bill of Exceptions of Each, Plaintiff and Defendant

Be It Remembered, that the above styled cause came on regularly for trial by the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, the Honorable Jeremiah J. Lynch, Judge, presiding, sitting without a jury, under date of November 2, 1943, plaintiffs being represented by counsel, Enor K. Matson, and the defendant being represented by counsel, E. G. Toomey. The parties having announced themselves as ready for trial, thereafter the following proceedings were [fol 74] had and done in connection with, and the following evidence was introduced upon the trial of said cause:

COLLOQUY

The Court: "38175" and "38265"—are there two cases to be tried or just one?

Mr. Toomey: I believe there are two, Your Honor. The first case filed is 38175, brought by the Board of Railroad Commissioners against the defendant, Aero Mayflower Transit Company, and shortly thereafter the Aero Mayflower Transit Company filed a direct action against the Board of Railroad Commissioners. As I understand it, and I believe counsel will agree, the issues in both cases, 38175 and 38265, are practically identical. There is no reason why they cannot be tried together.

The Court: You may stipulate they may be tried together.

Mr. Matson: That is agreeable. I think the same facts and same proof may be used in both cases.

Mr. Toomey: It is so agreed.

The Court: Let the record so show then.

Mr. Toomey: In cause 38175, Your Honor, in order to close issues, the defendant has filed a motion to strike certain allegations from the reply and answer of the plaintiff and served a copy of that on counsel. I don't desire at this time to offer any argument on that motion, and it may be submitted.

Mr. Matson: It is agreeable to us to submit it.

The Court: All right. The motion to strike is denied. I suppose the court may, in its findings, correct any redundant or irrelevant matter.

Mr. Toomey: Yes. It may go in with that reservation. And we will file at this time the reply of the defendant to the reply and answer of the plaintiff. That simply closes the issues in the case. With that the defendant is ready, [fol. 75] Your Honor.

Mr. Matson: Plaintiff is ready.

The Court: Let the record show it is stipulated in open court by counsel that the cases will be consolidated for trial.

Mr. Matson: It is our understanding, after conversation with counsel for the defendant, that counsel are willing to agree that the facts, all facts stated in the complaint in 38175 may be considered as true for the purpose of this hearing. Of course, there are certain exceptions. So far as the incorporation of the defendant is concerned, I think it would be agreeable to stipulate that the Aero Mayflower Transit Company is a corporation existing and organized and doing business under and by virtue of the laws of the state of Kentucky instead of Indiana.

Mr. Toomey: We'll so stipulate.

Mr. Matson: And also that the name of Leonard C. Young be substituted for that of Horace F. Casey as one of the members of the Board of Railroad Commissioners.

Mr. Toomey: It may be so stipulated.

The Court: Be substituted for Horace Casey as a member of the Board?

Mr. Matson: Yes.

Mr. Toomey: With respect to the allegations of the complaint, the defendant would admit the proceeding before the Board of Railroad Commissioners which were had and set out in full in the answer of the defendant. Of course, the defendant does not admit any legal conclusions drawn by plaintiff from the admitted facts.

Mr. Matson: That is our understanding, that no legal conclusions are admitted, but the facts.

The Court: Are all allegations of the complaint, with [fol. 76] the exception of any legal conclusions therein, admitted, Mr. Toomey?

Mr. Toomey: Yes.

The Court: Does that throw the burden on you to introduce evidence at this point?

Mr. Toomey: I think we should proceed at this time.

Mr. Matson: That is our understanding.

Mr. Toomey: We will call Mr. Wheating.

E. S. WHEATING, called as a witness, being first duly sworn, testified as follows:

Direct examination.

By Mr. Toomey:

Q. May we have your name, please?

A. E. S. Wheatington.

Q. Where do you live, Mr. Wheatington?

A. Indianapolis, Indiana.

Q. Are you connected with the defendant Aero Mayflower Transit Company?

A. Yes, I am.

Q. And what is that connection?

A. Vice president and general manager.

Q. How long have you been vice president and general manager?

A. About eight years.

Q. What are your duties in that office?

A. Well, the administrative duties of the organization.

Q. Do you have jurisdiction over the matter of operations?

A. Yes, I do.

Q. And over the admission of the corporation to the several states in which it carries on interstate business?

A. Yes.

Q. Over the rate affairs and charges?

A. Yes.

Q. How long have you been engaged in the motor transport business, Mr. Wheatington?

A. About 25 years.

Q. And what has been your experience in that connection?

A. Well, I have been engaged in practically every phase of the operation from probably the very lowest job to the one I am in at the present time.

Q. And that engagement has been continuous over the years?

A. Yes, it has.

Q. In what business has the defendant corporation engaged?

A. Just interstate motor carriers of household goods.

Q. Interstate motor carriers of household goods?

A. Yes.

Q. Tell the Court whether or not the defendant does any intrastate business in the state of Montana.

A. No, it does not.

Q. Does it do any intrastate business in any state of the union?

A. No, it does not.

Q. Is the defendant's business confined entirely to interstate operation?

A. Yes, that is correct.

Q. Do any of the revenues accruing to the defendant arise from intrastate operations in Montana?

A. No.

Q. Or from intrastate operations in any state?

[fol. 78]. A. No, they don't.

Q. In other words, then, all of the revenue which accrues to the defendant is interstate service?

A. Yes.

Q. Just describe to the court what the operation is so the Judge will have an understanding.

A. Well, we move household goods, and office furniture and fixtures, and store equipment and fixtures from any point in the United States to any other point in the United States, as long as it is from one state to another. The shipments vary in size, some are small and some acquire a full van, or maybe three or four vans. We operate between all 48 states, in that service under a certificate issued by the Interstate Commerce Commission.

Q. The Aero Mayflower Transit Company is the holder of a certificate of public convenience and necessity issued by the Interstate Commerce Commission?

A. Yes, we have such a certificate.

Q. And you operate in all 48 states under one certificate?

A. Yes. That certificate provides for operation between all towns and places in the United States.

Q. What is the number of that certificate?

A. 2934.

Q. Now, with reference to the state of Montana, did the defendant, prior to the commencement of this action, No. 38175, obtain from the plaintiff Board any permit?

A. Yes, we did.

Q. For what purpose?

A. For operation through the state.

Q. And did the defendant at that time and subsequently file insurance policies with the Board?

[fol. 79] A. Yes, we did.

Q. And file a tariff with the Board?

A. I don't know that tariff was required by the Board. If one was required, it was filed, I am sure.

Q. And if one was filed, it is, under the control of the clerk of the Board, is that right?

A. Yes.

Q. Now, Mr. Wheating, can you give us the totals for the year 1939 through 1942 of license fees paid by the Aero Mayflower Transit Company to the State of Montana in connection with license tax and plates for those vehicles?

Mr. Matson: We object on the ground it is irrelevant and immaterial what license fees it pays for plates, for the reason that the payment of such fees would not excuse or absolve the defendant from paying the fees due under the Motor Carrier Act.

The Court: The objection is overruled.

A. Yes, I can.

Q. Will you give us those figures?

A. For 1939—\$1,535.50; for 1940—\$1,250.25; for 1941—\$1,330.75; for 1942—\$1,195.75.

Q. Now, Mr. Wheating, does the defendant Aero Mayflower Transit Company, pay to the State of Montana any tax on gasoline by it purchased in the state?

A. Yes, we do.

Mr. Matson: We desire to enter the same objection to this.

The Court: All right. Let the objection be overruled. The Court will determine later whether this character of evidence has any application.

By Mr. Toomey:

Q. Can you give us the figures for the corresponding period, 1939 through 1942 inclusive?

[fol. 80] A. I can give you the approximate figures that we calculate for that tax.

Q. And that represents your best efforts to get at the facts?

A. Yes.

Q. What are they?

A. For 1939—\$553.85; for 1940—\$546.10; for 1941—\$838.50; for 1942—\$681.80.

Q. Now, Mr. Wheating, what is the cost figured to the defendant, Aero Mayflower Transit Company, on a per mile basis in Montana for these combined expenditures?

Mr. Matson: For the purpose of the record, we desire to object to this on the ground it is irrelevant and immaterial.

The Court: Overruled.

A. You mean for license, gas tax, and other tax?

By Mr. Toomey:

Q. Yes.

A. It is about $2\frac{1}{3}$ to $2\frac{1}{2}$ cents per mile.

Q. What is the system of figuring of the Aero Mayflower Transit Company in its operation throughout the union?

Mr. Matson: Let the record show the same objection.

The Court: Yes. Overruled.

A. Our average tax costs throughout the United States is a little less than one cent average each mile traveled.

Q. And since 1939 up to and including 1942, the cost to the Aero Mayflower Transit Company in Montana of the license fees and gasoline tax is running in excess of $2\frac{1}{3}$ cents a mile?

A. Yes.

Q. Now, Mr. Wheating, some contention is made by the Board with respect to the right to collect the minimum fee or license or charge of \$15.00 per vehicle under the gross [fol. 81] revenue tax, which provides that in Montana the carrier shall pay $\frac{1}{2}$ of 1% of gross revenue with a minimum of \$15.00. Can you tell us from your knowledge of the company's operation what that fee would amount to for the last several years, by years?

A. You mean from 1939 on through 1942?

Q. Yes.

A. Yes, I can.

Q. Has it been collected?

A. I have arrived at the income for that operation of the load-miles operated in Montana by using an average income per mile figure based upon the probable load factor we would have had in Montana. For the year 1939, the revenue would have amounted to approximately \$11,961.00.

By Mr. Matson:

Q. That is for the portion within the state of Montana?

A. That is right. The tax at $\frac{1}{2}$ of 1% would have been \$59.80. Now, do you want the amount of tax based on vehicles in that year?

By Mr. Toomey:

Q. Yes.

A. At that rate, the tax on the basis of the \$15.00 minimum, the tax would have amounted to \$660.00 in 1939. In 1940, the revenue would have approximated \$11,450.00. The tax on the percentage rate would be \$55.23.

Q. That is $\frac{1}{2}$ of 1%?

A. $\frac{1}{2}$ of 1%. And if it were collected on the basis of the minimum, the tax would have been \$630.00. For 1941, the revenue would approximate \$17,761.00. The tax at $\frac{1}{2}$ of 1% would be \$88.80. The tax on the basis of the \$15.00 minimum would have been \$870.00. For 1942, the revenue would have approximated \$16,160.50. The tax at $\frac{1}{2}$ of 1% would be \$80.80 and on the basis of \$15.00 minimum [fol. 82] would be \$1,935.00.

Q. Mr. Wheating, is the operation of the defendant in the state of Montana daily and continuous?

A. No, it is occasional.

Q. And by that, you mean what?

A. Infrequent, and whenever the need arises of picking up a shipment here or passing through the state with a vehicle going to some other state.

Q. In paragraph D of the answer of the Aero Mayflower Transit Company, to the complaint of the plaintiff, we have set forth certain figures showing the operations in this interstate commerce, which involves Montana as a part of the interstate operation for the years 1937, 1938 and 1939 the first ten months. You are familiar with those figures?

A. Yes, I am.

Q. Are they true and correct?

A. Yes.

Q. To your knowledge as vice president of the company?

A. Yes, sir.

Q. And did the operation since that time run along about the same as the average of that period?

A. Very much so; slightly in excess of that.

Q. Slightly in excess?

A. Yes.

Q. As due to the war emergency?

A. No. during 1939 and 1940, and probably the fore part of 1941, there was some increase in business, but now it has dropped off instead of an increase.

Q. For what reason?

A. Conservation.

Q. Does the Aero Mayflower Transit Company continue to pay to the State of Montana the tax demanded for gaso-[fol. 83] line and licenses?

A. Yes.

Mr. Matson: Objected to for the reason heretofore given.
The Court: Overruled.

By Mr. Toomey:

Q. And all tax, demand for license plates, and tax?

Mr. Matson: Same objection.

The Court: Overruled.

A. Yes.

Mr. Toomer: You may examine.

Cross-examination.

By Mr. Matson:

Q. Mr. Wheating, you have testified as to the total gross revenue of the earnings of your company within the state of Montana based on the mileage within the state of Montana for the years 1939, 1940, 1941 and 1942?

A. Yes.

Q. Now, so far as the year 1939 is concerned, did the Board of Railroad Commissioners of the state of Montana ever demand of your company payment of any fees based on $\frac{1}{2}$ of 1% for the total gross revenue of all of your revenue throughout all states?

A. Throughout all states?

Q. Yes.

A. Not to my knowledge.

Q. Has it ever made any demand of your company for payment of $\frac{1}{2}$ of 1% on the gross revenue of the entire gross revenue of the company?

Mr. Toomey: To which objection is made on the ground and for the reason that the statute in question provides that the Board shall collect $\frac{1}{2}$ of 1% of the gross revenue [fol. 84] from the carrier, subject to a minimum of \$15.00 per vehicle and that there is no language in the statute and no suggestion in the statute that the tax shall be applicable to any revenues that arise from any part of the interstate operations in Montana. And upon the further grounds that under the law, the statute is to be tested not by what the Board actually does under it in administration, but what may be done under the statute.

The Court: The objection is overruled.

A. No, not to my knowledge.

By Mr. Matson:

Q. As a matter of fact, the demand of the Board of Railroad Commissioners, prior to the bringing of this action, was for the minimum under the gross revenue, was it not, the minimum of \$15.00 per vehicle?

A. It was for the minimum of \$15.00 per vehicle for, I presume, the percentage of our Montana revenue. I don't know that they computed the percentage, and on account of the rather limited operation in the state, I presume they thought they might collect the minimum.

Mr. Matson: No further cross-examination.

(Witness excused.)

Mr. Toomey: We will call Mr. Matson.

ENOR MATSON, called as a witness, being duly sworn, testified as follows:

Direct examination.

By Mr. Toomey:

Q. May we have your name for the record, please.
[fol. 85] A. Enor Matson.

Q. And you are connected with the plaintiff, Board of Railroad Commissioners?

A. I am.

Q. In what capacity?

A. As secretary and counselor.

Q. And how long have you been secretary and counsel?

A. Since December 1940.

Q. And continuously up to the present time?

A. Yes.

Q. And as secretary of the Board, you have charge of its records, papers, files, etc.?

A. Yes.

Q. Have you brought with you here the Board's file in the matter of Aero Mayflower Transit Company?

A. Yes, I have.

Q. Can you find in there any demand made by the Board upon the defendant for payment of license fees tax?

A. I think, perhaps, I can, but I will have to look through it.

Q. I think it commences about 1938.

A. I find here a letter of May 11, 1938, addressed to the Aero Mayflower Transit Company and signed by Chief Clerk and Counsel for the Board of Railroad Commissioners.

Q. Is that letter a demand for payment of revenue for operation?

A. Yes, it appears to be.

Q. And what was the demand?

A. Do you want me to read the letter?

A. Yes, if you will.

A. (Reading) "Aero Mayflower Transit Company, 915 Daly Street, Indianapolis, Indiana.

[fol. 86] We have for reply your recent letter relative to our statement contained in our letter of April 28th. The \$64.02 shown as a balance due on gross revenue for 1936 is made up in this manner. You registered 5 trucks for which you paid the highway compensation fee of \$10.00 per vehicle. The minimum gross revenue for the year 1936 was \$15.00 per vehicle, or a total of \$75.00. In the four quarters of 1936 you reported on and paid a total of \$10.98 gross revenue fees. Deducting the payment of \$10.98 from the minimum due of \$75.00 left a balance of \$64.02. In the year 1937 you did not list your equipment, hence, we are unable to state whether there were 5 pieces operated or not. It is necessary for you to register this equipment and pay the highway compensation fee of \$10.00

per vehicle. Then basing your figures on the number of vehicles listed, you would figure the gross revenue minimum of \$15.00 per vehicle for the year 1937. Totalling the highway compensation fee on these vehicles, plus the gross revenue minimum for the same number of vehicles, you would find the total due for 1937. During 1937 you paid gross revenue fees in the amount of \$41.01. You should deduct \$41.01 from the total you figured due for 1937 and you would find the balance due for the year 1937. Add this balance to the \$64.02, the balance due for 1936, and you would find the total balance due up to January 1, 1938. We are enclosing a form on which you should furnish a description of the vehicles to be registered for the fiscal year 1937-1938."

Q. Is that the whole of the letter?

A. That is all of the letter, signed, "Very truly yours, Board of Railroad Commissioners, Chief Clerk and As-[fol. 87] sistant Counsel." The initials "WJN" to my knowledge was Walter J. Nylan, who was then Chief Clerk and Assistant Counsel.

Q. Mr. Matson, have you found in there, in the Board's files, where the Board made any demand on Aero Mayflower Transit Company for anything except the \$15.00 minimum under the gross revenue tax which the Board claims?

A. Well, it has also demanded the \$10.00 fee for vehicle fee.

Q. The \$10.00 for vehicle fee is under a separate statute, is that right?

A. That is right.

Q. I am referring now to the gross revenue statute, the demands of the Board under that statute, as made upon the Aero Mayflower Transit Company has always been for the \$15.00 minimum fee per vehicle, is that right?

A. As far as I am able to determine now. Perhaps I should make a more definite search of the files. I think that is correct.

Q. I think that is correct. I checked the files this morning.

A. As I recall it, a statement was prepared and sent to the Board showing what the minimum fees would amount to at \$15.00 per vehicle for the years 1937, 1938 and 1939, and demand was made of the company for payment, the usual minimum fees, together with the \$10.00 fee per vehicle. Those fees, I think, together amounted, in the

last statement, to something around \$1,900.00. I think at the time the action was started, or just before, they amounted to some \$1,600.00.

Q. Have you ever found where the Board made any demand on the defendant under the gross revenue statute for taxes based on the Board's theory for pro rationing between [fol. 88] inter state and intra state revenues? Referring to intra state now, and to that part of the intra state revenues, which may have flowed from inter state in Montana?

A. I don't recall any. It is my understanding that the Board has accepted the defendant's figures in that respect, and since the $\frac{1}{2}$ of 1% of the gross revenue of the operations in the state of Montana was less than the minimum, they demanded the minimum fee of \$15.00 per vehicle.

Q. Do you find in the Board's file any calculations by the Board of tax on the basis of the segregation of inter state dollar generally from inter state dollar arising in Montana?

A. I haven't run across any. Of course, as far as I know, the Board has never sent its auditor to examine the books of the defendant, and therefore, it relied on the reports made by the defendant.

Q. As far as the record shows, the demand made by the Board on the defendant under the gross revenue statute has always been for the \$15.00 per vehicle tax, is that right?

A. That is true as far as I know.

Q. Have you considered the question at all as to the effect of that demand if the $\frac{1}{2}$ of 1% gross revenue tax was less than resulting from the application of the minimum tax?

A. Well, from what I know about the attitude of the Board, such $\frac{1}{2}$ of 1% of the minimum of the gross operations in the state of Montana would be accepted if less than the minimum \$15.00 fee.

Q. Well, do you mean the Board would so construe the statute?

A. No, I don't mean that. I think I misunderstood your question.

Q. The board could not dispense with the provision, the [fol. 89] statutory provisions for a \$15.00 minimum?

A. No. What I mean to say is if the $\frac{1}{2}$ of 1% of the gross revenue of that part of the business within the state

of Montana is in excess of \$15.00 per vehicle, the Board would accept that; but where it is less, they would demand the \$15.00 minimum.

Q. Yes, that is what I wanted to know. Mr. Matson, please understand when I ask these questions, you may make any objection you desire.

A. Sure.

Q. What does the Board do with the revenues received from the \$10.00 flat tax per vehicle, and with the revenue received from the gross revenue tax?

A. I have no personal knowledge on that question. I can't answer that question because I have no personal knowledge and it would be entirely on hearsay and on what my understanding of what the law requires. I have no knowledge or information in regard to the handling of the funds or the fees because it doesn't come within my department. That is all attended to by the auditor.

Q. You know that all of these exactments go into a general jackpot used for the general purposes of the Board, for legislative purposes?

A. That is my understanding but I don't have any personal knowledge of it.

Mr. Toomey: I think that is all.

The Court: Do you want to cross examine yourself?

Mr. Matson: I don't think I have any cross-examination.

(Witness excused.)

Mr. Toomey: Now, if the Court please, we would like to [fol. 90] call Mr. Smith just briefly.

PAUL T. SMITH, called as a witness, being duly sworn, testified as follows:

Direct examination.

By Mr. Toomey:

Q. May we have your name?

A. Paul T. Smith.

Q. Where do you live, Mr. Smith?

A. Helena, Montana.

Q. Are you connected with the Board of Railroad Commissioners of Montana?

A. Yes.

Q. In what capacity?

A. I am a member of the railroad commissioners and Ex-
Officio Public Service Commission of Montana.

Q. And have been for how long past?

A. Since December 1938.

Q. Continuously up to the present time?

A. That is right.

Q. Mr. Smith, were you present in Court and heard all
the testimony of Mr. Matson, Secretary and Counselor
of the Board?

A. You mean today?

Q. Yes, today.

A. Yes.

Q. Is that testimony true and correct as far as you know?

A. I believe that it is.

Mr. Toomey: That is all.

[fol. 91] Cross-examination.

By Mr. Matson:

Q. You heard my testimony with reference to the
attitude of the Board so far as the collection of minimum
gross revenue fee is concerned?

A. Yes.

Q. Has the Board at any time ever attempted to collect
from this defendant the gross revenue fee of $\frac{1}{2}$ of 1%
based upon the total revenue of the defendant in all its
operations throughout the state?

A. No, only as far as the state of Montana is concerned;
the revenue that is received within the boundaries of the
state.

Q. Has such been its attitude in all cases since you have
been a member of the Board?

Mr. Toomey: Objected to on the grounds and for the rea-
son it is an attempted effort of the Board to amend the
statute.

The Court: Overruled.

A. Yes, that has been the interpretation of the Board
since I have been a member.

Mr. Matson: I think that is all.

(Witness excused.)

Mr. Toomey: Now, if the Court please, I think that is all of the evidence of the plaintiff at this time. I make that remark and would like in equity to draw the attention of the Court to the fact that while the answer and cross complaint is somewhat long, it assumes to set out at length the legal functions of the Board for the purpose of showing the many activities in which it is engaged and that the revenues by it demanded are used for general legislative purposes and not relating to highways. We rest at this [Vol. 92] point in chief.

Mr. Matson: May it please the Court, the plaintiff rests.

The Court: Do you want to orally argue the cases, gentlemen, or submit them on briefs?

Mr. Matson: So far as we are concerned, we are willing to submit them on briefs.

Mr. Toomey: It is agreeable with us, Your Honor.

The Court: All right. The record may show the cases are submitted on briefs and by the court taken under advisement.

IN THE DISTRICT COURT, SILVER-BOW COUNTY

REQUEST OF PLAINTIFFS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the Board of Railroad Commissioners of the State of Montana, plaintiffs, for the regularly constituted Board of Railroad Commissioners of the State of Montana in the above-entitled action and requests the court to make the following findings of fact and conclusions of law in the above-entitled case.

Paul T. Keller, Secretary-Counsel for the Board of Railroad Commissioners.

Service of a copy of the foregoing request and a copy of plaintiffs' proposed findings of fact and conclusions of law admitted this 1st day of May, 1945.

Toomey, McFarland & Hall, Edmond G. Toomey, Edgar M. Hall, Attorneys for Aero Mayflower Transit Company.

[fol. 93] IN THE DISTRICT COURT, SILVER BOW COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be it remembered that this cause came on for trial on the 2nd day of November, 1945, before the above-entitled court, both parties being represented by counsel, and the matter having been submitted upon briefs, the court makes the following findings:

I

That the plaintiff is the regularly constituted Board of Railroad Commissioners of the State of Montana.

II

That the defendant, Aero Mayflower Transit Company, is a corporation organized and existing under and by virtue of the laws of the State of Indiana.

III

That all of the facts stated in the complaint are admitted, excepting the matters therein contained which are legal conclusions.

IV

That the defendant, Aero Mayflower Transit Company, a corporation, is engaged in the business of interstate hauling for hire; that such corporation hauls household goods, office furniture and fixtures, and store equipment and fixtures from any point in the United States to any other point in the United States as long as it is from one state to another; and that said defendant, Aero Mayflower Transit Company, is the holder of a certificate of public convenience and necessity issued by the Interstate Commerce Commission.

V

[fol. 94] That the said defendant, Aero Mayflower Transit Company, did business within the State of Montana in the years 1937, 1938, 1939, 1940 and 1941,

VI

That for the year 1939 the said defendant did a gross revenue business in the State of Montana of \$11,961.09, and that one-half of 1% thereof would be \$59.00, and that

the minimum of \$15.00 per truck for the year 1939 would have amounted to \$660.00; that the said defendant had a gross revenue in the State of Montana of \$11,450.00 for the year 1940, and that the one-half of 1% tax thereon would have amounted to \$55.25, and the \$15.00 minimum tax for that year would have been \$630.00; that for the year 1941 the gross revenue was \$17,761.00, and one-half of 1% thereon would have been \$88.80, and the tax collectible upon the basis of the \$15.00 minimum would have amounted to \$870.00 for that year; that for the year 1942 the gross revenue within the State of Montana was \$16,160.50, and the tax at one-half of 1% would have been \$80.80, and the revenue on the basis of \$15.00 minimum per vehicle would have been \$1,035.00.

VII

That the Board of Railroad Commissioners of the State of Montana has made due request of the defendant for said amounts and that the same still remain due, owing and unpaid by the said defendant to the State of Montana.

From the foregoing findings of fact the court makes the following conclusions:

I

That the collection of the gross revenue fees as provided by Section 3847.27, Revised Codes of Montana, 1935, is not an undue burden upon interstate commerce.

[fol. 95]

II

That the type of hauling for hire rendered by the Aero Mayflower Transit Company, a corporation, is covered by Sections 3847.23 and 3847.27, and the tax levied thereby is collectible.

III

That the Aero Mayflower Transit Company, a corporation, is indebted to the State of Montana in the sum of one-half of 1% of its gross revenue or \$15.00 per vehicle minimum as required by Section 3847.27, Revised Codes of Montana, 1935.

IV

That the Aero Mayflower Transit Company, a corporation, is indebted to the State of Montana for the tax provided for by Section 3847.27 in the following sums, to-wit:

\$75.00 for the year 1936; \$75.00 for the year 1937; \$660.00 for the year 1939; \$630.00 for the year 1940; \$870.00 for the year 1941; \$1,035.00 for the year 1942.

That for the years 1938, 1943 and 1944 the defendant must make a return and pay the tax as required by Section 3847.27.

Done in open court this — day of —, 1945.

_____, District Judge.

[fol. 96] IN THE DISTRICT COURT, SILVER BOW COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW PROPOSED ON
BEHALF OF AERO MAYFLOWER TRANSIT COMPANY

Comes now Aero Mayflower Transit Company, a corporation, defendant and cross-complainant in the Cause No. 38175, and plaintiff in the Cause No. 38265, and having at the close of the evidence herein, requested on the minutes of the court, that the court make findings of fact and conclusions of law herein, now, within the time agreed upon by the parties for submission of proposals, in that respect, proposes the annexed findings of fact and conclusions of law in the above actions consolidated for trial and prays the court to adopt the same as its findings of fact and conclusions of law in said consolidated actions.

Toomey, McFarland & Hall. Edmond G. Toomey
& E. M. Hall, Attorneys for Aero Mayflower Transit Company.

(Service and receipt of copy acknowledged June 12, 1945.)

IN THE DISTRICT COURT, SILVER BOW COUNTY

(Nos. 38175 and 38265)

FINDINGS OF FACT AND CONCLUSIONS OF LAW BY THE COURT
IN CONSOLIDATED CAUSES

The two actions above entitled, each framed on identical or substantially identical issues, were consolidated for trial by stipulation of all parties thereto and as so consolidated came on regularly for trial on the merits in the above entitled cause on November 2, 1943, before the above

entitled court sitting without a jury, a trial by jury having been expressly waived by the parties. Evidence was offered by the respective parties, including the entire record of [fol. 97] the Board of Railroad Commissioners in this matter, and upon the close of the evidence the party requested the court to make findings of fact and conclusions of law upon the consolidated causes after receipt of briefs and proposed findings of fact, etc., for the respective parties, at which time of receipt the cause was deemed submitted for decision, and said proposals and briefs having been received within the time agreed upon by the parties, and the court having reviewed the pleadings, evidence and statements of the parties, and now being fully advised in the premises, makes the following Findings of Fact, and enters thereon the following Conclusions of Law, by the court, viz.,

FINDINGS OF FACT

1

That Aero Mayflower Transit Company (hereinafter referred to as "Aero") is, and has been since September 1928, a corporation organized and existing under and pursuant to the laws of the State of Kentucky, with its principal office in the City of Indianapolis, State of Indiana; that it owns and operates a fleet of motor trucks, all of which are licensed under the laws of the State of Indiana and carry at all times license plates of the State of Indiana; that its business is that of transporting by motor vehicle, in interstate commerce exclusively, over the highways of the United States used household goods and office furniture, incident only to the change of residence of the owner of such goods, under a separate order for such transportation, in each instance by the owner of said goods, at the rates for such transportation set out in its schedule of rates on file with the Interstate Commerce Commission of the United States.

2

[fol. 98] That Aero Mayflower Transit Company never has done, and does not now do, or carry on, any intra business in the State of Montana and that its operations with respect to the State of Montana have at all times been interstate operations into, out of, across or through said State. That it has been granted, and now operates under, Permit No.

2934 issued to it as a common carrier by said Interstate Commerce Commission under and pursuant to the provisions of the Federal Motor Carrier Act of 1935, as amended or supplemented.

3

That the Board of Railroad Commissioners of the State of Montana, (hereinafter referred to as "Board"), is an administrative agency of the State of Montana wholly of statutory origin, possessing only the powers and functions and entitled to discharge and exercise only the duties prescribed for it by the Legislative Assembly of Montana, as far as here material, by Ch. 184, Laws 1931 (now Sections 3847.1 to 3847.25, Revised Codes of Montana, 1935) as amended. That Paul T. Smith, Leonard C. Young and Horace F. Casey are, and have been since January 1, 1945, the duly and regularly elected, qualified and acting members of, and constituting said Board, the last two named being successors to members serving at the time these actions were commenced, and regularly substituted herein for such members.

4

That under date of October 3, 1935, the Board of Railroad Commissioners of the State of Montana, issued to Aero its Certificate, sometimes styled "Permit", No. 1354, pursuant to the provisions of Chapter 184, Session Laws of 1931, of the State of Montana, after a finding by said Board that public convenience and necessity required such operations, which "permit" granted Aero right to transport [fol. 99] property as a common carrier in interstate service only, by motor vehicles for hire, over and on the public highways of the State of Montana, and which "permit" of the State of Montana remained in full force and effect until the 9th day of October, 1939, on which latter date the said Board issued an order purporting to cancel and terminate said certificate, or "permit." That the "permit" so issued by the Board was of that class known as "Class C Motor Carriers" as defined in said Chapter 184 of the Session Laws of 1931.

5

In entering, crossing, or going out of the State of Montana, in connection with its operations, Aero has not oper-

ated, and does not operate between fixed termini or over a regular route or upon a definite schedule, nor upon charges based upon station to station rates or a mileage rate or scale, but on the other hand does enter into an order for shipment with each of its shippers, the contract price being according to the rates of Aero on file with said Interstate Commerce Commission.

6

That under date of September 19, 1939, the Board issued an order directing Aero to appear before it on October 6, 1939 to show cause, if any, why any right or rights, permit or permits, granted Aero by said Board to operate as a Motor Carrier over the public highways of the State of Montana in interstate commerce, should not be revoked and cancelled, said order to show cause being in words and figures as follows:

“BEFORE THE BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF MONTANA

Docket No. 3075

“IN THE MATTER OF FEES OWED BY THE AERO MAYFLOWER
TRANSIT COMPANY, a Motor Carrier

[fol. 100] “TO AERO MAYFLOWER TRANSIT COMPANY, INDIANAPOLIS, INDIANA:

“Whereas this Board who is charged with the administration of the Motor Carrier Act of this State has upon due investigation found that you, Aero Mayflower Transit Company of Indianapolis, Indiana, have been operating as a motor carrier for hire over the public highways of the State of Montana and are now operating as such motor carrier for hire over the public highways of the State of Montana relating to motor carriers by refusing to pay the fees required by the laws of the State of Montana as required of motor carriers under the laws of the State of Montana, and are now operating as a motor carrier for hire over the public highways of the State of Montana without complying with the laws of the State of Montana relating to motor carriers by refusing to pay said fees though various demands have been made by this Board upon you, Aero Mayflower Transit Company, to pay the

fees owed by you to the State of Montana according to the laws of the State of Montana for your operations as a motor carrier over the public highways of the State of Montana and you, Aero Mayflower Transit Company, have refused and now refuse to conform to said demands in making payment of said fees to the State of Montana.

NOW, THEREFORE, This Board being fully advised to the premises does hereby ORDER you, Aero Mayflower Transit Company, of Indianapolis, Indiana, to appear before this Board at its offices in the Capitol Building, Helena, Montana, on October 6, 1939, at 10:00 A. M. of said day and show cause if any you have why any right or rights, permit or permits granted you by this Board to operate as a motor carrier over the public highways of the State of Montana should not be revoked and cancelled by this Board because of your non-compliance with the laws of the State [fol. 101] of Montana relating to motor carriers as heretofore set forth as stated.

Done by order of the Board of Railroad Commissioners of the State of Montana this 19th day of September, 1939.

Paul T. Smith, Commissioner. Horace F. Casey,
Commissioner. Austin B. Middleton, Chairman.

ATTEST: OFFICIAL. JOHN W. BONNER, Secretary
and Counsel. (Seal.)

That on October 6, 1939, Aero appeared by its attorneys before said Board and filed its written return to said order to show cause, which said return is made a part of the complaint of defendant in Cause No. 38265, and by this reference made a part hereof as if expressly written into these findings for identification. And then and there at the hearing thereon, there was offered and received in evidence testimony in support of said return, and no other evidence was offered by the Board or received by the Board at said hearing, and said hearing was not attended by any other party or parties.

That under date of October 9, 1939, the Board issued an order purporting to cancel and terminate Aero's permit

issued as aforesaid, which purported order of cancellation and termination is in words and figures as follows:

**"BEFORE THE BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF MONTANA"**

Docket No. 3075. Order No. 1746°

**"IN THE MATTER OF FEES OWED BY THE AERO MAYFLOWER
TRANSIT COMPANY, a motor carrier"**

APPEARANCES:

E. G. Toomey, Attorney, Helena, Montana, for Aero Mayflower Transit Company.

[fol. 102] John W. Bonner, Counsel, for the Board.

"It appearing to this Board that the Aero Mayflower Transit Company of Indianapolis, Indiana, having made its return on October 6, 1939 at 10 o'clock A. M. of said day before this Board in its offices in the Capitol Building, Helena, Montana, in response to the Order to Show Cause heretofore issued by this Board in this Docket to the Aero Mayflower Transit Company why any right or rights, permit or permits granted by this Board to said Aero Mayflower Transit Company to operate as a motor carrier under the laws of the State of Montana should not be cancelled for the non-payment of fees owed by said Aero Mayflower Transit Company to the State of Montana under the laws of the State of Montana and rules and regulations of this Board.

And it further appearing to this Board that no good and legal reason exists why said fees should not be paid the State of Montana under the laws of the State of Montana by the Aero Mayflower Transit Company because of its operations as a motor carrier over the public highways of the State of Montana, and this Board after due consideration and deliberation and after being fully advised in the premises;

Does hereby cancel, revoke and extinguish Permit No. 1354, heretofore issued by this Board on October 3, 1935, to Aero Mayflower Transit Company authorizing it to transport property over the public highways of the State of Montana as a motor carrier because of said Aero May-

flower Transit Company refusing to pay to the State of Montana fees owed by it under the laws of the State of Montana and the rules and regulations of this Board because of its operations as a motor carrier over the public highways of the State of Montana.

Done in open session, at Helena, Montana, this ninth [fol. 103] day of October, 1939.

Paul T. Smith, Commissioner. Horace F. Casey,
Commissioner. Austin B. Middleton, Chairman.

Attest: Official. John W. Bonner, Secretary and Counsel. (Seal.)

Upon receipt of notice of such purported order of termination and cancellation of its said permit in Montana, Aero states that it ceased its operations in interstate commerce into, out of or across the said state of Montana, except with respect to two or three pieces of its equipment which at the time of receipt of said order were then already in or nearing the state of Montana, which equipment completed the shipments then in transit. In any event since December 5, 1939, Aero's operations in interstate commerce in Montana have been carried on under an agreement between Aero and said Board and bond posted in this court and approved by the undersigned, wherein it is recited in part:

"In consideration of the dissolution of said restraining order, and the restoration of the Transit Company's rights to operate in interstate commerce only into, out of, through and across the state of Montana, during the pending of said litigation, the said Transit Company and its said surety do hereby agree to promptly pay to said Board of Railroad Commissioners, the aforesaid fees, together with any like fees accruing during the pendency of said litigation; the payment of which shall, on final determination of said litigation, be determined to be due and owing by it; otherwise this obligation to be null and void."

That the fees demanded by the Board of Aero, referred [fol. 104] to in the Board's order of September 19, 1939 to show cause, and in its order of October 9, 1939, purport-

ing to terminate and cancel the said Montana Certificate or "Permit" No. 1354 of this defendant, are:

(A) Those described in Sections 16 and 17 of said Chapter 184 of the Session Laws of 1931, (now Sections 3847:16 and 3847:17, R. C. M. 1935), reading as follows:

"Section 16 (a). In addition to all the licenses, fees or taxes imposed upon motor vehicles in this State, and in consideration of the use of the public highways of this State, every motor carrier as defined in this Act, shall at the time of issuance of a certificate and annually thereafter, on or between the 1st day of July and the 15th day of July, of each calendar year, pay to the Board of Railroad Commissioners of the State of Montana, the sum of Ten Dollars for every motor vehicle operated by the carrier over or upon the public highways of this State.

Provided that a motor carrier engaged in seasonal operations only, where its said operations do not extend continuously over a period of not to exceed six months in any calendar year shall only be required to pay compensation fees in the sum equal to one-half of the compensation and fee herein provided, and provided further that the compensation and fees herein imposed shall not apply to motor vehicles maintained and used by motor carriers as stand-by or emergency equipment. The Board shall have the power and it is hereby made its duty to determine what motor vehicles shall be classed as stand-by or emergency equipment.)

(b) When transportation service is rendered partly in this State and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this Act relating to the payment of compensation and to [fol. 105] the making of annual or special reports or statements herein required and shall show the total business performed within the limits of this State and such other information concerning its operations within this State as may be required by the Board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this State.

(c) Upon the failure of any motor carrier to pay such compensation when due the Board may, in its discretion, revoke the carrier's certificate or privilege and no carrier whose certificate or privilege is so revoked shall again be

authorized to conduct such business until such compensation shall be paid."

"Section 17. All of the fees and compensation charges collected by the Board under the provisions of this Act shall be transmitted to the State Treasurer who shall place the same to the credit of ~~a special fund~~ designated as 'Motor Carrier Fund'; such fund shall be available for the purpose of defraying the expenses of administration of this Act and the regulation of the business herein described, and shall be accumulative from year to year. All expenses of whatsoever kind or nature of the Board incurred in carrying out the provisions of this Act shall be audited by the State Board of Examiners and paid out of the 'Motor Carrier Fund'. Such fund shall not come within the restriction of any laws of this State governing payment of expenses incurred in a previous year. It being intended that such fund shall be applied to the payment of any necessary costs or expenses in carrying out the provisions of this Act; whether incurred during the ensuing year or previous fiscal year, and such 'Motor Carrier Fund' or accumulations thereof are hereby appropriated for the [fol. 106] payment of the cost and expenses rendered necessary in the carrying out of the provisions of this Act; * * * and,

(B). *In addition, said Board demanded of Aero, fees prescribed by Sections 2 and 3 of Chapter 100 of an Act approved March 14, 1935 (now Sections 3847.27 and 3847.28 R. C. M. 1935), reading as follows:*

"Section 2. Additional Fees. In addition to all other licenses, fees and taxes imposed upon motor vehicles in this State, and in consideration of the use of the highways of this State, every motor carrier holding a Certificate of Public Convenience and Necessity, issued by the Public Service Commission, shall between the 1st and 15th January, April, July and October of each year, file with the Public Service Commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the Board a fee of one-half of one percent of the amount of such gross operating revenue; provided however that the minimum annual fee which shall be paid by — each

Class C. carrier for each vehicle registered and/or operated under the Motor Carrier Act shall be Fifteen Dollars.

"Section 3. Disposition made of Fees. All fees collected from motor carriers shall be, by the Commission, paid into the State Treasury and shall be, by the State Treasurer, placed to the credit of the Motor Carrier Fund. All other fees and charges collected by the Commission under the provisions of this Act shall be, by the Commission, paid into the State Treasury and shall be, by the State Treasurer, placed to the credit of a fund to be known as the 'Public Service Commission Fund' and the general and contingent expenses of the Public Service Commission shall be, by the State Treasurer, paid out of said Public [fol. 107] Service Commission Fund, upon presentation of duly verified claims therefor, which claims shall have been approved by the Commission and audited by the State Board of Examiners."

10

1937. During the calendar year of 1937, twenty-five different pieces of Aero's equipment entered, crossed or went out of the State of Montana, all in interstate commerce, the same bearing Indiana license plates numbered 3867, 3888, 3919, 3868, 3922, 3856, 3874, 3930, 3923, 3858, 3859, 3902, 3905, 3906, 3908, 3915, 3921, 19710, 2906, 3860, 3889, 3938, 19727, 141594, 141671, respectively; that one or more of said motor vehicles entered, crossed or went out of the State of Montana more than once during the said calendar year of 1937, as follows:

Six pieces of such equipment made only one trip each, into, out of, or through the State of Montana; 10 different pieces of such equipment made two trips each, 1 made three trips, 3 made four trips, 2 made five trips and 3 made eight trips into, out of or through the State of Montana during the year 1937. The total number of days or parts of days during the year 1937 that all of such equipment made any use of the highways of Montana, was 227 days, or an average use per day of Montana highways in interstate commerce throughout the year 1937 by any single piece of equipment, of eight days. That all of said several pieces of equipment traveled 227 days during said calendar year of 1937 in entering, crossing or going out of the said State of Montana; that all of said several pieces

of equipment traveled 10,077 empty, and 27205 loaded, miles, a total of 37,265 miles, within the boundaries of the State of Montana for said year of 1937:

1938. During the calendar year of 1938, forty different [fol.108] pieces of Aero's motor equipment entered, crossed or went out of the State of Montana, all in interstate commerce, the same bearing Indiana license plates numbered 3280, 3284, 3298, 3321, 3328, 3327, 3338, 3344, 3364, 3365, 3379, 3231, 3303, 3324, 3340, 3353, 3354, 3356, 3360, 3361, 3366, 3367, 3372, 3376, 3382, 3275, 3301, 3308, 3348, 3351, 15811, 941, 3222, 3273, 3330, 3368; 3384, 15820, and 3375, respectively; that some of said several pieces of equipment entered or left or crossed the State of Montana more than once during said calendar year as follows:

Ten different pieces of such equipment made two trips each, 8 made three trips each, 5 made four trips each, 1 made five trips, 1 made six trips, 1 made seven trips, 3 made eight trips each and 1 made fifteen trips each, into, out of or through the State of Montana during the year 1938. The total number of days or parts of days during the year 1938 that all of such equipment made any use of the highways of Montana, were 385, or an average use per day of Montana highways in interstate commerce throughout the year 1938 by any single piece of equipment, of nine days.

That all of said pieces of equipment traveled 385 days during said calendar year of 1938 in entering, crossing or going out of the said State of Montana; that all of said pieces of equipment traveled 18,642 empty, and 44,254 loaded, miles, a total of 62,896 miles within the boundaries of the State of Montana during said calendar year 1938.

1939. During the calendar year of 1939 up to the issuance of the temporary restraining order herein, thirty different pieces of Aero's motor equipment entered, crossed or went out of the State of Montana, all in interstate commerce, and all bearing Indiana license plates; that some of said several pieces of equipment entered or left or crossed the [fol.109] State of Montana more than once during said calendar year, as follows:

Ten pieces of such equipment made only one trip each into, out of, or through the State of Montana; 5 different pieces of such equipment made two trips each; 4 made three trips each, 7 made four trips each, 1 made five trips each, 2 made six trips each and 1 made seven trips into, out of or

through the State of Montana during the year 1939 to September 1st, thereof. That all of said pieces of equipment traveled 403 days during said calendar year of 1939 in entering, crossing or going out of the said State of Montana, that all of said pieces of equipment traveled 18,586 empty, and 47,413 loaded, miles, a total of 65,999 miles within the boundaries of the State of Montana during said period in the year 1939. The total number of days or parts of days during the year 1939 that all of such equipment made any use of the highways of Montana was 403, as aforesaid, or an average use per day of Montana highways in interstate commerce for said period by any single piece of equipment of 13.43 days.

That Aero refused and continues to refuse to pay the fees to said defendant Board as said fees are fixed and prescribed by said Chapter 184, Laws 1931, and said Chapter 100, Laws of 1935.

11

Pursuant to the provisions of Sections 1760-1760.10, Revised Codes of Montana, 1935, Aero has during each of the years 1937, 1938, 1939, registered and licensed the aforesaid several pieces of its equipment which entered the State of Montana; that for such registration and license plates of the State of Montana it paid to the State of Montana for the year 1937 the sum of \$660.50, for the year 1938, the [fol. 110] sum of \$1212.52, and for the first nine months of 1939 the sum of \$1473.50; that said sums so paid for said registration and license plates were payable, and paid, as compensation for the use by Aero of highways in and of the State of Montana; that by the express terms of said statute all of such registration and license plate fees are appropriated and allocated to funds to be used by and in the State for the construction, repair and maintenance of highways of and in the State of Montana.

That the total amount paid by the Aero in the calendar year 1937 for registration and license plates, public service permits and fees, mileage taxes, and other taxes; to the several States of the United States, for the use of the highways of the several States, which sums of money are under the respective statutes used for the construction, improvement and maintenance of highways, and exclusive of property taxes, was \$81,522.60; for the calendar

year 1938 the sum of \$85,284.25; for the first nine months of the year 1939 the sum of \$60,984.97.

That, in addition to the license taxes and exactions aforesaid demanded by the State of Montana from Aero for the use of Montana highways in the conduct of the interstate business of Aero, Aero pays to the State of Montana further and additional taxes for the operation of its motor vehicles, into, out of, through or across the State of Montana, in this to-wit:

Chapter 95, Laws of Montana, 1931 (Sections 2381.1-2396.9 Revised Codes of Montana, (1935) followed by initiative measure No. 41, adopted by a vote of the people of Montana at a general election held November 8, 1938, effective by virtue of proclamation of the Governor of Montana on November 13, 1938, provide an excise or license tax for [fol. 111] the privilege of engaging in or carrying on the business of refining, manufacturing, producing, impounding or selling, shipping, transporting, importing and distributing gasoline for use in motor vehicles, of five cents per gallon, which tax is, in practice, exacted from every buyer and purchaser of gasoline in the State of Montana and Aero, in the conduct of its interstate transportation business into, out of, across and through the State of Montana, purchases large quantities of said gasoline upon which it pays directly the said tax of five cents per gallon, all of the proceeds of which taxes are used by the State of Montana for the construction, preservation and maintenance of the roads and highways of the state, including the Federal Aid Highway system in Montana, and all of which proceeds are, in addition, pledged to the payment of state highway treasury anticipation debentures, under the initiative act aforesaid, issued to borrow money for the construction, betterment and maintenance of the state highways and roads of the State of Montana, including the federal aid system. In the year 1937, Aero paid an approximate total of \$745.30 to the State of Montana for such gasoline taxes, for the year 1938 an approximate total of \$1257.92 and for the year 1939 to the date hereof an approximate total of \$1649.98 for such gasoline taxes.

The moneys paid by Aero to the State of Montana, Motor Vehicle License Department, and to the State of Montana, for such Gasoline License-Highway Debenture Tax, exceeded in the years 1937 and 1938, two cents for every mile

traveled via motor vehicle operated by plaintiff in interstate commerce over the highways of Montana and in the year 1939, exceeded two and one-half cents for every like mile.

That due to the sparsely settled character of the State [fol. 112] of Montana and its relatively small populace and due, further to the fact that vast districts are not populated to any extent, and to great distances between populated centers, it is difficult to obtain a return load out of Montana because of the lack of business for Aero originating in said state, the total miles traveled by Aero's motor vehicles in interstate commerce in Montana in 1937 and 1938 and for the first ten (10) months of 1939 did not equal the average mileage per year per truck throughout the United States of America for Aero's operations. The total number of days all trucks of Aero were in the State of Montana, traveling loaded or unloaded, averaged a little in excess of one truck per each day of these years; and the empty mileage traveled in the State of Montana in 1937 was 37%, in 1938 was over 42%, and for the first ten months of 1939, 40% of total mileage traveled in Montana, against like percentage for the United States of 25%. A fair and reasonable charge as compensation for the right of using the highways of the State of Montana in conducting its business in interstate commerce is much less than the per traveled mile cost set forth above.

That such charges so collected by said departments of the government of said state constitute and are a reasonable compensation to be paid by Aero for the occasional use of Montana highways in interstate commerce or for any other benefit received by Aero from said State or any department thereof. That a portion of such license plate and gasoline tax charges is excessive and unreasonable and the same, together with any additional charges sought to be collected by the Board herein, constitute and are, and if collected in the future, will be, unreasonable, oppressive and unconstitutional burdens upon interstate commerce [fol. 113] as conducted by Aero in that said charges do and will exceed any proportionate benefit or advantage or protection to Aero.

Conclusions of Law

A

The amounts of money paid by Aero for registration, license plates and gasoline license-highway debenture taxes,

and the application of such funds to the highways of the State of Montana, including the Federal Aid Highway system, constitute and are more than a fair and just compensation to the State of Montana for the use of its highways by Aero in its operations in interstate commerce.

B

That the Board, by its action in making the said Order complained of herein, is attempting to prevent Aero from exercising its right to engage in interstate commerce, as aforesaid, when Aero has paid much more than a fair and reasonable compensation to other departments of the state, having jurisdiction over highways and highway traffic, and such other departments have collected from Aero such license plate and gasoline tax charges as compensation for permission granted to so operate within the state.

That during the year 1937, Aero's vehicles traveled a total of 7,826,046 miles throughout the United States, in 1938 a total of 8,348,558 miles and for the first nine months of the year 1939 a total of 6,818,501 miles; that the average cost for each of said traveled miles throughout the United States in said periods for license fees; gasoline taxes, Public Service Commission permits, property taxes and all other taxes, charges of every kind and character, was slightly less than 1¢ per traveled mile.

That the attempt of the Board of Railroad Commissioners [fol. 114] of the State of Montana to exact from Aero the ten (\$10.00) Dollars per truck fee fixed by Sec. 3847.16, Revised Codes of Montana, 1935, and the said order of the Board of Railroad Commissioners of the State of Montana, No. 1746 in Docket No. 3075, of October 9, 1939, attempting to force plaintiff to pay said charge by denying plaintiff all right to operate in interstate commerce over Montana highways, is null and void and violates the due process of law clause and, further, the equal protection of the laws clause, of the Fourteenth Amendment to the Constitution of the United States and the due process of law clause in Sec. 27 of Article III of the Constitution of the State of Montana, in that:

(a) The said Board failed to make any findings of fact consequent on the proceedings in said Docket No. 3075

and proceeded to an order therein without any findings of fact upon the record in said docket, as affirmatively appears from the face of said alleged order.

(b) The said Ten Dollar per motor vehicle license fee or tax, provided by Sec. 3847.16, Revised Codes of Montana, 1935, is, by the terms of Chapter 184, Laws 1931, applicable only, if at all, to the operations of motor carriers as defined in said act, which operations are intrastate in character, and relate and cover only motor carriers licensed by said Board for the transport of freight, goods, and commodities in intrastate commerce between points wholly within the State of Montana, and exclusively subject to the jurisdiction of said state, and to the jurisdiction of said Board as limited by the Legislative Assembly of Montana.

(c) That none of the proceeds from said Ten Dollar per motor vehicle tax assumed to be collected by said Board and transmitted to the State Treasurer of the State of Montana and by that officer carried in a special fund [fol. 115] known as "Motor Carrier Fund" is used for the construction, maintenance, improvement or betterment of any roads or highways, bridges or highway facilities in the State of Montana; that said Board is not authorized by the provisions of Chapter 184, Laws 1931; or any other law of the State of Montana, to appoint or set up any inspectors, field men, or supervisors under and in connection with Chapter 184, Laws 1931, and the attempted regulation of the business of motor carriers under the terms of said act is in no manner related to the use of the highways, or roads of the State of Montana by motor carriers. That none of the proceeds of such Ten Dollar License fee is expended by said Board or any department of the state government for any purpose or benefit to plaintiff in its interstate commerce operations.

D

That if said Ten Dollar per vehicle license fee, as prescribed by Sec. 3847.16, R.C.M. 1935, must be construed as contended by said Board, i.e., as applicable to the operations of Aero in interstate commerce into, out of, through and across the State of Montana, the said attempted license fee or tax, is null and void in contravention of clause 3 of Section 8 of Article I of the Constitution of the United States of America and the due process of law clause of

the Fourteenth Amendment to the Constitution of the United States, and section 27 of Article III of the Constitution of Montana, in that:

(a) The State of Montana, by and through said Board of Railroad Commissioners, or otherwise, is without power to tax interstate commerce.

(b) The said tax, as thus laid and construed, indiscriminately covers both intrastate commerce and interstate commerce, is not capable of separation and application to each commerce, and fails as a whole in its attempted application [fol. 116] to the operation of this plaintiff, and this court is without power to re-write the statute under guise of pretended "construction" when the legislature has written it as it stands.

(c) None of the fees attempted to be collected by the Board of Railroad Commissioners of the State of Montana from Aero and transmitted to the State Treasurer of the State of Montana and by him carried in the so-called "motor carrier fund" is appropriated by law, or in practice employed, for the construction, maintenance or preservation of any state highways or of any roads of the State of Montana, or for any purpose of benefit to Aero in its interstate commerce operations, and under such circumstances the said fees are a burden on interstate commerce, and not unpaid to the highways over which such commerce moves.

(d) The said attempted charge of Ten Dollars (\$10.00) per truck is a flat and arbitrary exaction and does not bear any reasonable relation to the actual use of the highways of Montana by Aero, no part of said charge being levied or used for highway purposes, and the same is in no way based upon the actual use of the highways of Montana by this plaintiff.

(3) That the total of said Ten Dollars (\$10.00) per truck fees demanded of Aero, together with like sums paid to the Board of Railroad Commissioners by motor carriers in fact subject to the provisions thereof, is excessive and more than is reasonably necessary or proper to defray the expenses of the administration of the Act and the regulation of the business, by said Board of Railroad Commissioners.

(f) That the demanded fees from the flat Ten Dollar tax, (which tax is in addition to license plate and gasoline excise taxes paid by Aero) of \$250.00 for the year 1937, [fol. 117] amount to an excessive, exorbitant, unreasonable and burdensome charge of over 7/10ths cents per traveled mile by Aero within the confines of the State of Montana in said year; that the demanded fees of \$400.00 for the year 1938 and the demanded fees of \$300.00 for the year 1939 amount respectively to an excessive, exorbitant, unreasonable and burdensome charge of more than 6/10ths cents per traveled mile in 1938 and more than 1/2¢ per traveled mile in 1939 by this plaintiff within the confines of the State of Montana.

That said Board does not furnish any police inspection, protection or supervision in connection with its pretended regulation under said Ten Dollar Tax.

(g) That a reasonable charge to Aero for the purpose of defraying the expenses of administration and the regulation of the business by the Board of Railroad Commissioners is less than the amount demanded;

(h) That the fees demanded for each of the years in question are in each instance more than the privilege is worth.

(i) That the fees attempted to be collected by the Board of Railroad Commissioners from Aero under said section 16 of Chapter 184 aforesaid, for each of said years, are in and of themselves excessive, exorbitant, unreasonable in amount, and constitute an undue and unjust burden on the interstate commerce transacted by Aero and that said demanded fees, taken in connection with the fees already paid to the State of Montana for the registration of and license plates for its several vehicles during the periods in question, constitute and are thereby a greater undue and unjust burden on the interstate commerce transacted by Aero.

[fol. 118]

E

That the attempt of said Board of Railroad Commissioners of the State of Montana to collect and exact from Aero, for and on account of its operations in interstate commerce as aforesaid, a fee of one-half of one per cent of the gross operating revenue of Aero from all its business in

the United States of America; or even all its interstate business in the geographical area of Montana, subject to a stated annual minimum of \$15.00 for each vehicle registered and/or operated under the Montana Motor Carrier Act, and the order of said Board No. 1746 in Docket No. 3075, is wholly unlawful, null and void, in that:

(a) The said tax or fee, if applicable to the operations of any motor carrier, is confined and is intended to be confined to the operations of motor carriers operating only in Montana and, as such, is in no respect applicable to the national interstate operations of Aero, or to the exclusively interstate operations of Aero through the geographical area of Montana.

(b) The said gross revenue tax, with annual minimum (as so construed) is an attempt by the State of Montana, through its *Public Service Commission*, to burden the operations of motor carriers whose respective businesses derive no benefit or advantage from the regulation of public utilities within the State of Montana, with part of the cost of administration of the *Public Service Commission of the State of Montana*, which Commission, by the provisions of Sections 3879-3913, Revised Codes of Montana, 1935, is charged with the regulation of public utilities in the State of Montana, i.e., utilities privately owned or publicly owned, distributing heat, street railway service, light, power in any form or by any agency, water for [fol. 119] business, manufacture, household use or sewerage service, telegraph or telephone service to the general public, and none of the activities of the said *Public Service Commission of the State of Montana* is in any manner or respect related directly or indirectly, to the regulation of the business of motor carriers over the highways of the state of Montana, or to the construction, maintenance, betterment and improvement of any roads or highways in Montana, or to the policing of the same or of any regulation of motor carriers, and none of its activities is of any benefit or advantage to plaintiff or has any relation to plaintiff or its operators.

That the Public Service Commission of Montana is a wholly separate administrative agency of the State of Montana. (Sec. 3880, R.C.M. 1935) and when the Legislature writes in the words, "*Public Service Commission of Montana*", referring to an agency for collection of a tax, this

court has no power to write in the name of another agency. (Section 10519, R.C.M. 1935, the law of Montana since 1877.)

That if the so-called gross operating revenue tax with annual minimum was, by gross abuse of the powers of judicial interpretation to be construed as collectible by the Board of Railroad Commissioners of Montana (and not the Public Service Commission) and to be construed as applicable to the operations of Aero in exclusive interstate commerce, (and such statute is so construed by said Board of Railroad Commissioners,) then the said Sections 3847.27 and 3847.28, Revised Codes of Montana, 1935, are, and each of them is, unconstitutional, null and void in that:

(a) The said statutes and the action of the Board thereunder violate Clause 3, Section 8, Article I of the Constitution of the United States of America and, in addition, the due process of law clause and the equal protection of [fol. 120] the laws clause of the Fourteenth Amendment to the Constitution of the United States of America and, further, the due process of law clause of Section 27 of Article III of the Constitution of the state of Montana, in that the State of Montana is without power, right or authority to tax the interstate commerce of Aero, such being the only commerce in which it engages.

(b) The State of Montana is without right, power or authority to apply, collect or exact an occupation tax or privilege tax indiscriminately applied to both intra-state business and interstate business, without regard for the substantial distinctions between the two types of businesses, and without apportionment, or basis of apportionment, so as clearly to exclude from its operation and effect the business of Aero as engaged exclusively in interstate commerce.

(c) If said so-called gross operating revenue tax is to be construed as a property tax upon property of Aero employed within the State of Montana, the same is unconstitutional and void in that the same is not based upon any assessment or consideration of a just valuation of such property and therefor the same is not assessed or levied or sought to be collected in accordance with the requirements of Article XII, Sections I and II of the Montana Constitution.

(d) No part of the fees under said Sections are exacted as compensation for the use of any of the highways of Montana by Aero; such fees bear no relation whatsoever to the use of said highways; no part of them is to be used or is usable for the construction, improvement, repair or maintenance of any of the highways of Montana, but on the other hand, by the express terms of said Act, all of said fees are paid into the State Treasury, to the credit of the Motor Carrier Fund, referred to in Section 17, of Chapter 184 of the laws of 1931.

[fol. 121] (e) The fees provided by said Sections purport to be equal to one-half of one per cent of the amount of gross operating revenue of Aero (and all others similarly situated) with the proviso that with respect to each Class "C" carrier, as is Aero, a minimum annual fee shall be \$15.00 per each vehicle registered and/or operated under the Motor Carrier Act; such provision wholly fails to make any distinction between gross receipts in interstate and gross receipts in intrastate commerce; the minimum of \$15.00 per truck is an arbitrary, capricious figure and without warrant in law.

(f) The fees proposed to be exacted by the Board of Railroad Commissioners under this section constitute and are an occupation tax, and therefore, are not applicable or assessable or collectible against Aero, which is engaged solely in interstate commerce, under the protection of the Constitution of the United States and of the government of the United States which has affirmatively and extensively entered into the field of regulating interstate commerce by motor vehicle under the Federal Motor Carrier Act of 1935, as amended, in accordance with Permit No. 2934, issued to it by the Interstate Commerce Commission of the United States.

(g) All receipts of Aero are paid to it and are payable to it at its principal office in the State of Indiana, and no part of its receipts are paid to or payable to it in the State of Montana. The fees under said sections reach and cover indiscriminately, and without apportionment, the gross compensation of the interstate commerce carried on by Aero and said sections contravene in entirety the said provisions of the Federal and State Constitutions afore-said as applied to receipts from interstate commerce.

(h) In its practical operation the enforcement of the [fol. 122] provisions of said Sections against Aero amount to an unlawful and unwarranted discrimination against interstate commerce.

(i) The said sections attempt to assess, lay and collect a privilege tax upon the receipt of plaintiff's gross income from and in interstate commerce.

(j) None of the proceeds from said gross operating revenue tax, with annual minimum, is directed by law to be used or employed, and in practice none thereof is used or employed, in the construction, maintenance, betterment or improvement of any roads or highways in the State of Montana, for any purpose or benefit to Aero or any operators in interstate commerce, or intrastate commerce, but all of said fees are, in truth and in fact, directed to be used and are used for the general and contingent expenses of the Public Service Commission of the State of Montana, a legislative agency confined to the regulation of public utilities in the State of Montana as defined by Section 3881, Revised Codes of Montana, 1935, and the statute, as it stands and must be construed in view of its unmistakable language, represents an attempt to defray some part of the cost of representing public utilities by the Public Service Commission of Montana, at the expense of operators of motor vehicles in interstate and intrastate commerce, over whose businesses the Public Service Commission of Montana has utterly no control in law or in fact.

(k) That the ~~statute~~ is to be tested by what may be done under it and not by what the administrative agency may determine to do under it, and the statute contains no provision, rule or standard for apportionment of tax between interstate and intrastate commerce, and this court has no power to legislate such provision or standard, and therefore the statute violates the due process of law clause of [fol. 123] the Federal and State Constitutions and the Commerce Clause of the Federal Constitution.

F.

That in Cause No. 38175, Aero is entitled to judgment against the Board in accordance with the prayer of Aero's Answer and Cross-Complaint therein, and that in Cause No. 38265, Aero is entitled to judgment against the Board

in accordance with the prayer of its complaint therein, each party to pay its respective costs. Judgment and Decree to be signed by the undersigned.

Done and dated, this — day of —, 1945.

District Judge.

[fol. 124] IN THE DISTRICT COURT, SILVER BOW COUNTY

FINDINGS OF FACT AND CONCLUSIONS OF LAW—
Filed June 23, 1945.

This case heretofore came regularly on for trial before the court sitting without a jury, the plaintiffs being represented by counsel, Enor K. Matson, Esq., and the defendant being represented by counsel, E. G. Toomey, Esq. Thereupon, witnesses were examined and evidence was introduced in behalf of said parties and the evidence being closed on the day the trial began the cause was submitted for consideration and decision on briefs to be thereafter handed in by said counsel and was by the court taken under advisement.

The court being now fully advised in the premises makes its findings of fact and conclusions of law herein as follows, to-wit:

FINDINGS OF FACT

1. That the plaintiffs, Paul T. Smith, Leonard C. Young and Horace F. Casey are now and for several months past have been the duly elected, qualified and acting members of the board of railroad commissioners of the State of Montana.

2. That the defendant is now and ever since September, 1928, has been a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky.

3. That in the years 1937, 1938 and 1939 the defendant owned and maintained a fleet of motor trucks which were used by it in transporting for valuable considerations household goods and office furniture, in interstate commerce exclusively, over and upon the highways of the United States; that during said years it so operated under a permit issued to it by the Interstate Commerce Commission of the United States.

[fol. 125] 4. That in the year 1937 the defendant operated twenty-five motor vehicles over and upon the public highways of the State of Montana in the conduct of its said business; that in the year 1938 the defendant operated forty motor vehicles over and upon the public highways of the State of Montana in the conduct of its said business, and that in the year 1939 the defendant operated forty-four motor vehicles over and upon the public highways of the State of Montana in the conduct of its said business.

5. That the defendant has refused to pay to said Board of railroad commissioners for the said years 1937, 1938 and 1939 the fees prescribed by Section 3847.16, Revised Codes of Montana, 1935, for the reason as it contends that as to it the said section is invalid; that the defendant likewise has refused to pay to said board for the said years 1937, 1938 and 1939 the annual fees prescribed by Section 3847.27, Revised Codes of Montana 1935, for the reason as it contends that as to it the said section is invalid.

CONCLUSIONS OF LAW

From the foregoing findings of fact the court draws the following conclusions of law, to-wit:

1. That section 3847.16, Revised Codes of Montana, 1935, is a valid exercise of legislative authority and should be obeyed.

2. That section 3847.27, Revised Codes of Montana, 1935, as applied to the defendant is invalid for the reason that it fails to specify any method by which the gross operating revenue of the defendant in the state of Montana for any year may be determined, and for the further reason that the Public Service Commission of the state of Montana mentioned as the administrative body in sections 3847.26, 3847.27 and 3847.28, Revised Codes of Montana 1935, has nothing [fol. 126] to do with the regulation and supervision of motor carriers using the public highways of the State of Montana.

3. That the defendant should be restrained and enjoined from operating its motor vehicles over and upon the public highways of the state of Montana until it has paid the said board of railroad commissioners the sum of two hundred fifty dollars as annual fees for the year 1937, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1938, until paid; the sum of four hundred

dollars as annual fees for the year 1938, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1939, until paid; and the sum of four hundred and forty dollars as annual fees for the year 1939, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1940, until paid.

4. That the plaintiffs are entitled to their costs herein expended.

Let a decree be entered herein accordingly.

Done in open court this 23rd day of June, 1945.

Jeremiah J. Lynch, Judge.

ORDER SETTLING BILL OF EXCEPTIONS

I, Jeremiah J. Lynch, Judge of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, and who presided at the trial of the above entitled cause, do hereby certify that the above and foregoing Bill of Exceptions proposed by the plaintiffs and, separately, proposed by the defendant, is full, true and correct, and contains all of the evidence and testimony introduced upon the said trial, together with all matters and proceedings had at the trial, and the orders of the court then and thereafter made in the course of said action, and the same is by me signed, settled and allowed as the Bill of Exceptions in said cause available to each, the plaintiffs and the defendant for all purposes.

Dated this 29th day of October, 1945.

Jeremiah J. Lynch, Judge.

[fol. 127] IN THE DISTRICT COURT, SILVER BOW COUNTY

AMENDED FINAL JUDGMENT—August 31, 1945

• Be it remembered that this case came on regularly for trial before the court, sitting without a jury, on the second day of November, 1943, Enor K. Matson, Esq., appearing as attorney for the plaintiffs and E. G. Toomey, Esq., appearing as attorney for the defendant, and the court having heard the testimony and having examined the proofs offered by the respective parties, and the respective parties having

filed Proposed Findings of Fact and Conclusions of Law and Briefs in support thereof, and the court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law, and having directed that Judgment be entered in accordance therewith, and the court having heretofore and on the 29th day of June, 1945, entered its judgment, and it now appearing that said judgment does not follow the Findings of Fact and Conclusions of Law heretofore entered by the court and that said Judgment should be superseded by this amended judgment:

Now therefore, by reason of the law and the findings aforesaid, it is hereby ordered, adjudged and decreed:

I. That the defendant be and it hereby is restrained and enjoined from operating its motor vehicles over and upon the public highways of the state of Montana until it has paid to the plaintiff, Board of Railroad Commissioners of the State of Montana, the sum of Two Hundred Fifty Dollars (\$250.00) together with interest thereon from the first day of January, 1938, until paid; the sum of Four Hundred Dollars (\$400.00) together with interest thereon from the first day of January, 1939, until paid, and the sum of Four Hundred Forty Dollars (\$440.00) together with Interest [fol. 128] thereon from the first day of January, 1940, until paid. Together with the plaintiffs' costs herein expended.

II. It is further ordered, adjudged and decreed that the plaintiff Board be and it is hereby denied any injunctive or other relief insofar as the refusal of the defendant to pay to the plaintiff Board for the years 1937, 1938, 1939 the annual fees prescribed by Section 3847.27, Revised Codes of Montana, 1935, is concerned.

III. It is further ordered, adjudged and decreed that said Board be and it is hereby enjoined and restrained from enforcing or applying against defendant any of the provisions of Section 3847.27, Revised Codes of Montana, 1935, and in particular from exacting any of the fees and taxes therein specified.

Dated this 31st day of August, 1945.

Jeremiah J. Lynch, District Judge.

[fol. 128a] IN THE DISTRICT COURT, SILVER BOW COUNTY

NOTICE OF APPEAL TO SUPREME COURT OF MONTANA BY BOARD
OF RAILROAD COMMISSIONERS OF MONTANA

To the Defendant, Aero Mayflower Transit Company, a corporation, and to Messrs. Toomey, McFarland & Hall, attorneys for said defendant:

You, and each of you, are hereby notified and will please take notice that the plaintiffs, Board of Railroad Commissioners of the State of Montana, Paul T. Smith, Leonard C. Young and Horace F. Casey, as members of and constituting the Board of Railroad Commissioners of the State of Montana, hereby appeals to the Supreme Court of the State of Montana from that portion of the Amended Judgment of the above entitled cause duly given, made and entered on August 31, 1945, wherein said court denied this plaintiff relief against the above named defendant in certain respects.

This appeal is taken by the plaintiffs above named only from so much of said amended judgment as contained in paragraphs II and III thereof, being that portion of the amended judgment denying said plaintiffs relief in so far as the annual license fee prescribed by Section 3847.27, Revised Codes of Montana, 1935, is concerned, and upon all questions of law and fact herein.

Paul T. Keller, Attorney for Plaintiffs.

Service of the above and foregoing Notice of Appeal admitted and copy thereof received this 26 day of November, 1945.

E. G. Toomey, Attorney for Defendant.

[fol. 128b] IN THE DISTRICT COURT, SILVER BOW COUNTY

NOTICE OF APPEAL TO SUPREME COURT OF MONTANA BY AERO
MAYFLOWER TRANSIT COMPANY

To the Plaintiffs, Board of Railroad Commissioners of the State of Montana, Paul T. Smith, Leonard C. Young and Horace F. Casey, as members of and constituting the Board of Railroad Commissioners of the State of Mon-

taná; and to Hon. Paul T. Keller, Counsel for said Plaintiffs:

You, and each of you, are hereby notified and advised, and will please take notice, that the Defendant, Aero Mayflower Transit Company, a corporation, hereby appeals to the Supreme Court of the State of Montana from that certain portion of the Amended Final Judgment in the above entitled cause, duly given, made and entered on September 1st, 1945, wherein it is Ordered, Adjudged and Decreed, as follows:

"I. That the defendant be and it hereby is restrained and enjoined from operating its motor vehicles over and upon the public highways of the state of Montana until it has paid to the plaintiff, Board of Railroad Commissioners of the State of Montana, the sum of Two Hundred Fifty Dollars (\$250.00) together with interest thereon from the first day of January, 1938, until paid; the sum of Four Hundred Dollars (\$400.00) together with interest thereon from the first day of January, 1939, until paid, and the sum of Four Hundred Forty Dollars (\$440.00) together with interest thereon from the first day of January, 1940, until paid. Together with the plaintiffs' costs herein expended."

This appeal is taken by defendant above named to only so much of said Amended Final Judgment as is above quoted, but upon all questions of law and of fact herein affecting the same.

Edmond G. Toomey and E. M. Hall, Toomey, McFarland & Hall, Attorneys for Defendant.

Service of the above and foregoing Notice of Appeal admitted and copy thereof received this 26th day of November, 1945.

Paul T. Keller, Attorneys for Plaintiffs.

[fol.128c] IN THE SUPREME COURT OF MONTANA

SPECIFICATIONS OF ERROR BY AERO-MAYFLOWER TRANSIT COMPANY ON ITS APPEAL—Filed March 13, 1946

(1) The court erred in overruling the special and general demurrer of Aero to the complaint of the Board. (Tr. pp. 7-9; 105)

(2) The court erred in refusing or failing to make findings of fact as proposed by Aero. (Tr. pp. 111-142)

(3) The court erred in refusing or failing to make conclusions of law as proposed by Aero. (Tr. pp. 131-142)

(4) The court erred in refusing or failing to make conclusions of law affirming that the Ten Dollar per motor vehicle license tax attempted to be provided by Section 3847.16 R.C.M. 1935, is null and void under the due process of law clause of the 14th Amendment to the Constitution of the United States, and under Sec. 27 of Article III of the Constitution of Montana. (Tr. pp. 132-136)

(5) The court erred in making its Conclusion of Law No. 1. (Tr. pp. 143-144)

(6) The court erred in making its Conclusion of Law No. 3. (Tr. p. 144)

(7) The court erred in making and entering part of its judgment, i.e., Paragraph numbered I therein (Tr. pp. 82) restraining defendant from operating in interstate commerce over the highways of Montana until it paid the Ten Dollar per vehicle tax for the years 1938, 1939 and 1940. (Tr. pp. 81-82½)

(8) The court erred in admitting evidence, over objection, as follows:

[fol. 128d] "Q. Has it ever made any demand of your company for payment of ½ of 1% on the gross revenue of the entire gross revenue of the company?

Mr. Toomey: To which objection is made on the ground and for the reason that the statute in question provides that the Board shall collect ½ of 1% of the gross revenue from the carrier, subject to a minimum of \$15.00 per vehicle and that there is no language in the statute and no suggestion in the statute that the tax shall be applicable to any revenues that arise from any part of interstate operations in Montana. And upon the further grounds that under the law, the statute is to be tested not by what the Board actually does under it in administration, but what may be done under the statute.

The Court: The objection is overruled.

A. No, not to my knowledge."

9. The court erred in finding and concluding that Section 3847.16 R.C.M. is a valid and constitutional statute of the State of Montana.

○ [fol. 123e] IN THE SUPREME COURT OF MONTANA

SPECIFICATIONS OF ERROR BY BOARD OF RAILROAD COMMISSIONERS OF MONTANA ON ITS APPEAL—Filed January 5, 1946

1. In overruling the objection to evidence regarding the state license fee for the reason that such evidence was immaterial. (Tr. 89)
2. In failing to adopt the conclusions of law of this appellant. (Tr. 107 to 110)
3. In making its Conclusion of Law in paragraph designated 2 of its Findings of Fact and Conclusion of Law of the Court for the reason that the same is contrary to the evidence and to the law. (Tr. 142 to 144)
4. In finding Section 3847.27 invalid in the Court's Conclusions of Law.

[fol. 129]

[File endorsement omitted]

IN SUPREME COURT OF MONTANA

No. 8646

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, Paul T. Smith, Leonard C. Young and Horace F. Casey, as Members of and Constituting the Board of Railroad Commissioners of the State of Montana, Plaintiffs and Appellants on Appeal of said Board, and Respondents on Cross-Appeal of Aero Mayflower Transit Company, a Corporation,

v.

AERO MAYFLOWER TRANSIT COMPANY, a Corporation, Defendant and Respondent on Appeal of said Board, and Appellants on Cross-Appeal of Aero Mayflower Transit Company, a Corporation

Submitted: April 13, 1946. Decided: June 29, 1946

OPINION—Filed June 29, 1946

[fol. 130] Mr. Justice MORRIS delivered the Opinion of the Court:

This controversy involves the question as to what extent a state may impose burdens in the way of licenses and taxes upon motor carriers engaged in interstate commerce for operating their vehicles over the highways of the state. Such exactions are imposed upon the presumption that the state owns the highways within its borders, and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways.

The Board of Railroad Commissioners of the State of Montana, hereinafter referred to as the Board, brought this suit to restrain the Aero Mayflower Transit Company, a Kentucky corporation, hereinafter referred to as the Company, from operating its motor vehicles over the highways of the state until it shall have complied with the provisions of Chapter 310 of the Political Code, known as the Motor Carriers Act, comprising sections 3847.1 to 3847.28 of the Revised Codes, inclusive. A restraining order was issued as prayed for by the Board, and the Company for some

months discontinued operations in the state, but later filed a bond with the court and the court made an order permitting the Company to continue operations pending determination of the issues involved.

There is no dispute as to the facts. The Company is engaged in the motor transportation of used or second hand household goods and office furniture from one state to another for hire. It does not transport any goods of any nature or kind from one point to another in the same state. The only transportation it engages in so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to [fol. 131] a destination in some third state. It alleges that it operates under permit No. 2934 issued to it by the Interstate Commerce Commission. It appears that in October 1935 the Board issued to the Company a "Class C" permit. In September 1939 the Board issued an order directing the Company to show cause why its permit to operate its vehicles over the highways of Montana should not be revoked. A hearing followed on October 6, 1939, and on the succeeding 9th of October the Board issued an order cancelling the permit theretofore issued to the Company on the ground that the Company was using the highways of the state "In an unlawful and unauthorized" manner. The position of the Board appears to be that the Company may not use the highways of the state until it shall have applied to the Board and been granted a permit and paid the taxes and fees imposed by statute.

To the complaint of the Board in the instant action the Company interposed both a special and general demurrer, and such demurrers being overruled, the Company answered by way of general denial followed by cross-complaint. The cross-complaint at great length sets out the various acts of the parties showing the conflicting views of each which gave rise to the issues involved in the action. Briefly stated the Company contends that the Motor Carriers Act, supra, is not applicable to interstate commerce, but governs those engaged in intrastate commerce only; that sections 3847.16 and 3847.17, if applied to it, violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and sections 1 and 11 of Article XII of the Constitution of Montana.

It appears that the state has heretofore and for some years collected two separate exactions from the Company:

The Registration License Tax authorized by sections 1760- [fol. 132] 1760.10, Revised Codes; and the tax on sales of gasoline, authorized by sections 2381.1 to 2396.9, Revised Codes. The further exactions challenged by the Company in this action are (a) the "Ten Dollar per vehicle 'straight' or 'flat' tax," authorized by sections 3847.16 and 3847.17, Revised Codes, and (b) The tax of one-half of one per cent of the amount of *gross revenue*, from wherever derived by the defendant in the United States, under section 3847.27," which is the construction the Company places upon that section, with a minimum fee of \$15.00 for each vehicle operated by the Company in Montana.

While there is but one set of findings of fact, conclusions of law, and a single judgment, two separate actions were entered on the docket in the lower court, action No. 38175 in which the Board was the complainant, and action No. 38765 in which the Company was the complainant. When the actions came on for hearing the parties stipulated in open Court that the actions might be combined and tried as one, it being agreed that the issues in the two actions were practically the same.

The combined action was tried to the court sitting without a jury. The pleadings by the Company contained practically all the record facts involved in the controversy between the parties relative to the orders made by the Board and sundry hearings had before it. All the evidence adduced at the hearing before the trial court consisted of a brief examination of the counsel and chairman of the Board and the examination of the Vice-President and Manager of the Company. When both parties rested, the matter was submitted on briefs, and both parties later submitted proposed findings of fact and conclusions of law. The court made and entered its own findings of fact and conclusions of law, and made and entered its amended judgment, it having been found that the judgment first entered did not follow the [fol. 133] findings of fact and conclusions of law. By conclusion of law number 2 the court held that section 3847.16, Revised Codes, "is a valid exercise of legislative authority and should be obeyed." By the amended judgment the Company was restrained and enjoined from operating its motor vehicles over the highways of the state of Montana until it shall have paid the amounts due the state as demanded under section 3847.16, Revised Codes, as follows: for the year 1938, \$250.00; for the year 1939, \$400.00; for

the year 1940, \$440.00, with interest on the respective amounts from the first day of January of each year mentioned until paid, with costs to the Board. It was "further ordered, adjudged and decreed that said Board be and it is enjoined and restrained from enforcing or applying against defendant any of the provisions of section 3847.27, Revised Codes of Montana, 1935, and in particular from exacting any of the fees and taxes therein specified." Both the Board and the Company appealed from that part of the judgment adverse to it. The effect of the judgment of the trial court is to overrule the Company's contention that section 3847.16 is invalid as in conflict with the commerce clause of the Federal Constitution, and the Constitution of Montana.

The effect of the trial court's order enjoining the Board from enforcing any of the provisions of section 3847.27, Revised Codes, is to relieve the Company from the obligation to comply with the Board's demand to pay the tax of one-half of one percent of its gross revenue or the minimum fee of \$15.00 on each vehicle operated over the roads of the state.

Of the nine specifications of error assigned by the Company, the first is upon the court's overruling its demurrer to the complaint. The Company by its demurrer contends that as the Board is purely a creature of statute it has no power to sue; that by reason of the provisions of section [fol. 134] 3806, Revised Codes, the state is a necessary party to these actions. The Board of Railroad Commissioners is created and its powers enumerated by Chapter 309 of the Political Code, comprising sections numbered 3779 to 3847 inc., Revised Codes, and Chapter 310 as heretofore mentioned is the Motor Carriers Act. By section 3847.8 of the latter chapter the enforcement of the Motor Carriers Act is vested in the Board of Railroad Commissioners. It is true, as contended by the Company, that section 3806 provides actions to enforce the Board's regulations under the law shall be brought by the Attorney General in the name of the state, but section 3847.14 of the Motor Carriers Act provides, in part, "Orders and final determinations of the board in all proceedings pursuant to the provisions of this act shall be enforced in the manner provided for the enforcement of orders of the board of railroad commissioners by the provisions of chapter 309 of the political code, and laws amendatory thereof. Pro-

vided, further, that if any motor carrier shall operate in violation of the provisions of this act, or shall fail or neglect to obey any lawful order of the board, *the board or any party injured may apply to any court of competent jurisdiction, in any county where such motor carrier is engaged in business, for the enforcement of this act or such order; and the court shall enforce obedience thereto by writ of injunction, or other proper process, mandatory; or otherwise, and to restrain such carrier, its officers, agents, employees, or representatives from further violation of this act, or such order, or to enjoin upon it, or them, obedience to the same.*" We think this section must be construed along with section 3806, *supra*, and being a later enactment controls and modifies section 3806, and that the Board is authorized to maintain this action.

Specifications of error Nos. 2 and 3 are on alleged error [fol. 135] of the court in refusing to adopt the findings of fact and conclusions of law proposed by the Company. Such proposed findings and conclusions are predicated upon the contention that as the Company is engaged in interstate transportation only the legislative acts under which the Board assumes to enforce the exactions in the way of fees and taxes are acts which apply exclusively to motor carriers engaged solely in intrastate commerce. In this connection the Company contends that section 3847.16, Revised Codes, is null and void by reason of its conflict with the Fourteenth Amendment to the Constitution of the United States and with section 27 of Article III, the due process clause, of the Constitution of Montana, and it is further contended that the fees and licenses which the Board demands the Company shall pay may, under the statute, be used for other purposes than improvement and maintenance of the highways of the state, and that when such exactions in the way of taxes and licenses are imposed upon the Company for other purposes they become in effect exactions on interstate commerce and section 3847.16, Revised Codes, is therefore illegal and void as to the plaintiff, being in violation of Clause three of section 8, Article I of the Constitution, the commerce clause, of the United States.

Mr. Justice Brandeis, speaking for the court, clearly stated the rule applicable to the relative rights and power of the Federal Congress and state legislatures in regard to providing rules and regulations and imposing exactions in the way of fees, licenses and taxes on motor carriers in

the case of *Interstate Transit, Incorporated v. Lindsey*, 283 U. S. 183, 75 L. Ed. 953, a case arising under an act of the legislature of the state of Tennessee imposing a tax upon concerns operating interstate motor busses on the highways of the state. The controversy involved "a privilege tax [fol. 136] graduated according to carrying capacity." A tax of \$500 a year was imposed upon each vehicle seating more than twenty and less than thirty passengers. The motor company made a quarterly payment under protest and brought suit to recover the amount paid on the ground that the statute applied violated the commerce clause of the Federal Constitution. The trial court allowed recovery, but its judgment was reversed by the Supreme Court of the state and the case was appealed to the Supreme Court of the United States as above indicated. Justice Brandeis said: "While a state may not lay a tax on the privilege of engaging in interstate commerce, *Sprout v. South Bend*, 277 U. S. 163, it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. *Kane v. New Jersey*, 242 U. S. 160, 168-169; *Clark v. Poor*, 274 U. S. 554; *Sprout v. South Bend*, supra, pp. 169-170. As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, or by the express allocation of the proceeds of the tax to highway purposes, as in *Clark v. Poor*, supra, or otherwise where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. *Hendrick v. Maryland*, 235 U. S. 610, 612; *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 250-252. Compare *Interstate Busses Corp. v. Holyoke Street Ry.*, 273 U. S. 45, 51. * * *

[fol. 137] "The conclusion that the tax challenged is laid for the privilege of doing business and not as compensation for the use of the highways is confirmed by contrasting section 4 of the 1927 Act with those statutes which admit-

tedly provide for defraying the cost of constructing and maintaining highways and regulating traffic thereon. The former declares specifically in connection with the privilege tax on interstate busses that the proceeds 'shall go and belong exclusively to the General Funds of the State.' On the other hand, in the legislation by which Tennessee has provided for defraying the cost of constructing and maintaining the state highways and regulating motor traffic, it has been the consistent practice to prescribe that moneys raised for this purpose shall be segregated and go into the Highway Fund. The present system of motor regulations was inaugurated in 1915. At the same session, the legislature created a State Highway Commission with power to construct and maintain highways. In these statutes and in many later ones—prescribing additional fees for the registration and licensing of motor vehicles, imposing gasoline taxes, laying a one mill road tax, and authorizing the issue of bonds for the construction of highways and bridges,—the legislature provided that the proceeds of the fees, taxes, and bonds, and of the tolls collected on bridges, should be set apart as state highway and bridge funds to be expended by the Commission exclusively for the construction and maintenance of highways or bridges. The absence in Section 4 of this provision, which characterizes almost every other Tennessee statute relating to the construction and maintenance of highways or the regulation of motor vehicle traffic, is additional evidence that the present tax was not exacted for such purposes, but merely as a privilege tax on the carrying on of interstate business. [fol. 138] "It is suggested that a tax on busses graduated according to carrying capacity is common and is a reasonable measure of compensation for use of the highways. It is true that such a measure is often applied in taxing motor vehicles engaged in intrastate commerce. Being free to levy occupation taxes, States may tax the privilege of doing an intrastate bus business without regard to whether the charge imposed represents merely a fair compensation for the use of their highways. Compare *Gundling v. Chicago*, 177 U. S. 183, 189. But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the

use made, or to be made, of the highways of the State. *Clark v. Poor*, *supra*. In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses."

In an annotation in 135 A. L. R. 1358, it is said: "• • • it is well settled that in the absence of Federal legislation especially covering the subject, a state may prescribe regulations governing the use of motor vehicles on its highways, providing such regulations do not impose undue burdens on interstate commerce, and are reasonable and not discriminatory." [fol. 139] tory."

In the case of *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734, the question of the right of the state to restrict the width of motor vehicles operated on the state highways and the gross load carried, was involved. Mr. Justice Stone, speaking for the court, said: "Ever since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints.

"The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method; and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant

burdens on those without the state. *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 498; *Caldwell v. North Carolina*, 187 U. S. 622, 626. It was to end these practices that the commerce clause was adopted. See *Gibbons v. Ogden*, 9 Wheat. 1, 187; *Brown v. Maryland*, 12 Wheat. 419, 438-439; *Cooley v. Board of Port Wardens*, supra; *State Freight Tax*, 15 Wall. 232, 280; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 289, 297-298; *Cook v. Pennsylvania*, 97 U. S. 566, 574; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217; *Baldwin v. Seelig*, 294 U. S. 511, 522, 11 [fol. 140] *Farrand* * * *. Few subjects of state regulation are so peculiarly of local concern as is the use of highways. * * *. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse. * * *

"The nature of the authority of the state over its own highways has often been pointed out by this Court. It may not, under the guise of regulation, discriminate against interstate commerce. But 'In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.' *Morris v. DUBY*, 274 U. S. 135, 143. This formulation has been repeatedly affirmed; *Clark v. Poor*, 274 U. S. 554, 557; *Sprout v. South Bend*, 277 U. S. 163, 169; *Sproles v. Binford*, 286 U. S. 374, 389, 390; cf. *Morf v. Bingham*, 298 U. S. 407, and never disapproved. This Court has often sustained the exercise of that power although it has burdened or impeded interstate commerce. * * *. Restrictions favoring passenger traffic over the carriage of interstate merchandise by truck have been similarly sustained, *Sproles v. Binford*, supra; *Bradley v. Public Utilities Comm'n*, 289 U. S. 92, as has the exaction of a reasonable fee for the use of the highways. *Hendrick v. Maryland*,

[fol. 141] 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160; *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245; *Morf v. Bingaman*, *supra*; cf. *Ingles v. Morf*, 300 U. S. 290.

"In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states. . . .

"When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. *Jacobson v. Massachusetts*, 197 U. S. 11, 30; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 365; *Price v. Illinois*, 238 U. S. 446, 451; *Hadacheck v. Sebastian*, 239 U. S. 394, 408-414; *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 530; *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 388; *Zahn v. Board of Public Works*, 274 U. S. 325, 328; *Standard Oil Co. v. Marysville*, 279 U. S. 582, 584. This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. 'It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. *Morris v. Duby*, *supra*, 143; *Sproles v. Binford*, *supra*, 389, 390; *Minnesota Rate Cases*, *supra*, 399, 400; *Smith v. St. Louis & S. W. R. Co.*, 181 U. S. 248, 257; *Reid v. Colorado*, 187 U. S. 137, 152; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 42, 43."

The foregoing authorities clearly establish the right of the state to impose upon motor carriers engaged in inter-[fol. 142] state commerce exactions by way of taxes and licenses for use by such motor carriers of the state highways when such exactions are necessary to build, maintain, and supervise the highways. In addition the exactions must be such as are reasonably necessary for the purposes mentioned, and must not be discriminatory as between state and interstate carriers. It further appears to be the established rule of the federal courts to require the interstate carrier who challenges the right of the state to impose such licenses and taxes to affirmatively show that the exactions

demanded are not necessary for the purposes mentioned or are discriminatory. In other words the burden is on the carrier to show wherein the exactions are unlawful as to him.

Adverting to the contention of the company that section 3847.27 is invalid, the trial court having so held, the Board contends the court's holding was erroneous.

The company's position is that as section 3847.23, Revised Codes, provides in part that it shall not be necessary for an interstate motor carrier to make any showing of public convenience and necessity in order to obtain a permit to operate in Montana, that it therefore necessarily follows that the company being an interstate carrier section 3847.27 does not apply to it, but only to intrastate carriers. To the contention that the Motor Carriers Act does not apply to the company, we do not agree. The Act was obviously intended to apply to all motor carriers operating over the highways of the state. See section 3847.1 (h) and 3847.16, Revised Codes. It clearly appears that the legislature was aware of decisions of the Supreme Court of the United States with which the Act might conflict and endeavored to have the Act so drawn as to meet such a situation. By section 3847.24 of the Act provision is made by which if any part or provision is found to be unconstitutional it shall [fol. 143] not affect the validity of the balance of the Act. Certain parts of section 3847.23, supra, were obviously incorporated in the Act for the same purpose, particularly that part of such section which provides that it shall be unnecessary for any interstate motor carrier to make any showing of public convenience and necessity in order to obtain a state permit. However, elimination of the part of section 3847.23 to which we have just referred does not abate the tax imposed by section 3847.27, Revised Codes. The company in support of its contention that Chapter 310 was designated to control intrastate motor carriers only, cites *Buck v. Kuykendall*, 267 U. S. 307, and *Bush & Sons Company v. Maloy*, 267 U. S. 317; twin cases, the opinion in both being delivered by Mr. Justice Brandeis. Both were rendered in January, 1925, and the Motor Carriers Act was not enacted until 1931, six years later.

In the first case Buck desired to operate an auto stage line for hire between Portland, Oregon, and Seattle, Washington. Oregon granted Buck a certificate of public convenience and necessity, but the state of Washington refused

such a certificate. When the case in the course of litigation reached the Supreme Court of the United States, it was held that "the Washington statute is a regulation, not of the use of its highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it." That conclusion was predicated upon the proposition that the "primary purpose (of the statute requiring such a certificate) is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to [fol. 144] others for the same purpose and in the same manner." The decision in the Bush case was practically to the same effect and on similar facts. It is obvious that the two decisions were based upon the ground of unlawful discrimination. There is no showing of discrimination in the case at bar. All motor carriers are made subject to the same regulations, under our Motor Carriers Act.

The trial court held in the case at bar, "That section 3847.27, Revised Codes of Montana, 1935, as applied to the defendant is invalid for the reason that it fails to specify any method by which the gross operating revenue of the defendant in the state of Montana for any year may be determined, and for the further reason that the Public Service Commission of the state of Montana mentioned as the administrative body in sections 3847.26, 3847.27 and 3847.28, Revised Codes of Montana 1935, has nothing to do with the regulation and supervision of motor carriers using the public highways of the State of Montana."

On the question of the constitutionality of section 3847.27, this court said in the case of *State v. Stark*, 100 Mont. 365, 52 Pac. (2d) 890, that, "In determining whether an Act of the legislative assembly is invalid or not, it has long been the established rule of this court that the constitutionality of any Act shall be upheld if it is possible to do so (*State ex rel. Tipton v. Erickson*, 93 Mont. 466, 19 Pac. (2d) 227; *Hale v. County Treasurer*, 82 Mont. 98, 105, 265 Pac. 6), and that a statute 'is prima facie presumed' to be constitutional, and all doubts will be resolved in favor of its validity. (*State ex rel. Toomey v. Board of Examiners*, 74 Mont. 1, 238 Pac. 316, 320.) The invalidity of a statute must be shown beyond a reasonable doubt before this court will declare it to be unconstitutional. (*Herrin v. Erickson*,

90 Mont. 259, 2 Pac. (2d) 296.) And a statute will not be [fol. 145] held unconstitutional unless its violation of the fundamental law is clear and palpable. (Hill v. Rae, 52 Mont. 378; 158 Pac. 826, Ann. Cas. 1917E, 210, L. R. A. 1917A, 495.)"

By reading sections 3847.27 and 3847.16 together, which the rule on statutory construction enjoins, State v. Bowker, 63 Mont. 1, 205 Pac. 961, it becomes clear that the clause in section 3847.27 imposing upon the company a tax of one-half of one per cent. based upon its "gross operating revenue" that in the use of this phrase by the legislature the gross revenue derived from operations in Montana was intended and not the company's gross revenue from all sources. No other reasonable intention is conveyed by paragraph (b) of section 3847.16 which is as follows:

"When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state."

"The legislative intention . . . is controlling." State v. Smith, 57 Mont. 563, 574, 190 Pac. 107, and cases cited. There could have been but one purpose in incorporating paragraph (b) in section 3847.16, namely, to ascertain the gross revenue derived by the company's operations in Montana in order to use that as a basis for the levy of the tax of one-half of one per cent.

It was said in United States v. Freeman, 3 Howard 565, (44 U. S. 548), "A thing which is within the intention of [fol. 146] the makers of the statute, is as much within the statute as if it were in the letter." Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention to which we do not agree, no difficulty would arise in putting into effect the minimum fee of \$15.00 required for each company vehicle operated within the state.

Furthermore, in this connection it is our opinion that when the legislature enacts a statute imposing the duty of enforcement of such statute upon a particular board or officer of the state but fails or neglects to clearly prescribe and incorporate in the Act the mode of enforcement, that such officer or board may adopt any fair and reasonable mode of enforcement designed to effectuate the purposes of the Act. In other words, when a duty is imposed upon a particular officer or board in express terms such other duties are implied as are necessary to carry into effect those that are expressed.

Such, we think, is the effect of the rule laid down in the case of *Morse v. Granite County*, 44 Mont. 78, 119 Pac. 286, and followed in *Fisher v. Stillwater County*, 81 Mont. 31, 261 Pac. 607; *Arnold v. Custer County*, 83 Mont. 130, 269 Pac. 396, and *State v. Stark*, 100 Mont. 365, 52 Pac. (2d) 890.

We do not agree with the trial court that the Public Service Commission "has nothing to do with the regulation and supervision of motor carriers using the public highways." The functions and duties of the Board relative to railroads, motor carriers, common carriers of oil, the inspection of boats and supervision of navigation, and public utilities, are closely related and the administration of the whole is upon a Board composed of the same three persons, and by reference many of the rules and regulations ex-[fol. 147] pressly applicable to one are also made applicable to another. The accounts and finances relating to each of these legislative Acts must of course be kept separate and distinct, but all are under the same management and we see no sound reason why the same overall board, while convened for the purpose of dealing with some railroad problem, may not at the same time dispose of questions relating to motor carriers or any other duty imposed upon the Board. The necessity of having minutes of such meetings kept separately as to the particular things done does not affect the powers of the Board to dispose of, at the same time, other duties coming under its supervision.

The terms "Board of Railroad Commissioners" and "Public Service Commission" are used interchangeably and we think it was the legislative intent by section 3847.27 to use the words "Public Service Commission" as including the "Board of Railroad Commissioners." If this were not so, then section 3847.27 would have no meaning whatsoever,

since strictly speaking the Public Service Commission does not issue certificates of public convenience and necessity.

The company contends that in fixing the exactions imposed upon it, no distinction is made between large and small vehicles, or heavy and light loads, nor the number of miles travelled over the highways. There is merit in this contention. The heavier the load and the greater the number of miles travelled the greater the wear and tear on the roadway. It is obvious that the tax set up in section 3847.27 was for the purpose of meeting this situation. A short trip and a light load would bring the carrier but little revenue whereas the heavier traffic and longer hauls would produce more revenue and require more taxes. Some discrimination may arise from the tax but in that respect we refer to what was said in *Hilger v. Moore*, *supra*, where [fol. 148] at page 176 we find in the case of *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 364, 371, 46 L. Ed. 949, 22 Sup. Ct. Rep. 673, 676, this rule applied:

"But, further, the validity of this legislation does not depend on the question whether the courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. The courts are not authorized to substitute their views for those of the legislature. We can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the state has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against nonresidents."

Again it is contended that revenue is demanded from the Company to be used to pay salaries of the Board members and for other alleged unlawful purposes. We think a full and complete answer to all such contentions is found in the case of *Clark v. Poor*, 274 U. S. 554, at pages 556-557, where Mr. Justice Brandeis, speaking for the court, said: "The plaintiffs claim that, as applied to them, the Act violates the commerce clause of the Federal Constitution. They insist that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the State; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to impose,

in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, . . . for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, [fol. 149] *merce*, are subject to regulation by the State to ensure safety and convenience and the conservation of the highways. *Morris v. Duby*, ante, [271 U. S. 135] p. 135; *Hess v. Pawloski*, ante, [274 U. S. 352] p. 352. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra-tax for such use. *Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160. Compare *Packard v. Banton*, 264 U. S. 140, 144.

"There is no suggestion that the tax discriminates against interstate commerce. Nor is it suggested that the tax is so large as to obstruct interstate commerce. It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the Commission in the administration or enforcement of the Act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs." To the same effect is *Dixie Ohio Express Co. v. State Revenue Comm. of Georgia*, 306 U. S. 72, 83 L. Ed. 495.

In differentiating between the numerous decisions of the United States Supreme Court wherein questions involving interstate commerce were considered and determined it is important to keep in mind that actions involving the use of state highways for the purposes of interstate commerce have no relation to actions relating to railroads, telephone or telegraph lines, sleeping car or freight line owners, where all such facilities are owned by the particular public utility; and motor carriers operating over highways owned by the state. In the case at bar Montana owns the highways over which the company operates [fol. 150] its vehicles and the taxes imposed are for the use

of the state highways. The revenue collected is devoted to the building, repairing and policing of such highways, and that which the state furnishes is an aid, not a burden to interstate commerce.

The judgment of the lower court in restraining the Company from operating its vehicles over the highways of Montana until it shall have paid the exactions imposed pursuant to section 3847.16, Revised Codes, as set out in such judgment, is affirmed. As to the order of the lower court restraining the Board from enforcing the exactions imposed upon the Company by section 3847.27, Revised Codes, the cause is remanded with instructions to vacate and set aside such order, and enter judgment in favor of the Board in accordance with this opinion.

C. F. Morris, Associate Justice.

We concur:

Carl Lindquist, Chief Justice; Hugh R. Adair, Albert H. Angstman, Associate Justices.

[fol. 151] Mr. Justice CHEADLE:

Because of lack of time to study the foregoing decision, due to recess by the court, I reserve my opinion with the understanding that it shall become a part of the foregoing, or a dissent thereto.

Edwin K. Cheadle, Associate Justice.

[File endorsement omitted]

IN SUPREME COURT OF MONTANA

DISSENTING OPINION—Filed September 19, 1946

Mr. Justice CHEADLE dissenting:

The majority opinion is based upon and attempted to be supported by the fallacious premise that the exactions in question "are imposed upon the presumption that the state owns the highways within its borders, and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways." I can find no support for any such presumption. I fully appreciate the problem of maintaining our highways, and the necessity of exacting a fair

compensation for their use by foreign-owned trucks, but I cannot, as a matter of expediency, lend my support to the exaction of such compensation by judicial edict.

Section 3847.27, Revised Codes, provides: "In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall . . . file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of [fol. 152] operation, or portion thereof, and shall pay to the board a fee of one-half of one per cent of the amount of such gross operating revenue; provided, however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars (\$30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars (\$15.00)."

Section 3847.28 provides: "All fees collected from motor carriers shall be, by the commission, paid into the state treasury and shall be, by the state treasurer, placed to the credit of the motor carrier fund. . . . Disposition of this fund is directed by section 3847.17, as follows: "Such fund shall be available for the purpose of defraying the expenses of administration of this act and the regulation of the business herein described, and shall be accumulative from year to year. All expenses of whatsoever kind or nature of the board incurred in carrying out the provisions of this act shall be audited by the state board of examiners and paid out of the 'motor carrier fund.' . . ."

Since the defendant company is engaged solely in interstate commerce, three questions involving the interpretation of the quoted sections immediately present themselves, viz:

1. Does section 3847.27 include only motor carriers holding a certificate of public convenience and necessity, or does it contemplate all motor carriers? Section 3847.23 contains the provision "that it shall not be necessary for any interstate or international motor carrier, in order to obtain a permit as herein provided, to make any showing

of public convenience and necessity, except as to the transportation of passengers and/or freight between points [fol. 153] within this state” It would seem that the wording of section 3847.27 restricts the operation of that section to motor carriers to those holding certificates of public convenience and necessity. The defendant company, being engaged only in interstate commerce, is not included within such class.

2. In computing the amount of the exaction prescribed by section 3847.27 (one-half of one per cent of the amount of the gross operating revenue), what is to be the measure of the gross operating revenue of the carrier employed only in interstate commerce? Is it to be based upon the proportionate mileage travelled over Montana highways of the aggregate distance travelled by the vehicle? Or shall it be calculated upon the gross revenue of the carrier from all sources? If the provisions of this section were intended to include interstate motor carriers, it is apparent that the gross operating revenue, from whatever source, must be the yardstick of the exaction. Such an exaction would be so manifestly unfair, discriminatory and unreasonable as to impel the conclusion that the legislature did not intend the inclusion of strictly interstate carriers. It is urged that the practice of the plaintiff board has been to exact only the minimum fee prescribed. But such is only a minimum, and is not an alternative exaction; and the test to be applied, of course, is what might be done under the statute, not what has been done.

3. Does the purpose for which the tax is collected and applied constitute an interference with and a burden upon interstate commerce, prohibited by the federal Constitution and statutes, as defined by the Supreme Court of the United States? The majority opinion quotes extensively from the leading case of *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183, 75 L. Ed. 953. But it would seem to me that the [fol. 154] holding of that case refutes rather than supports the conclusion arrived at here. As quoted in the majority opinion, Justice Brandeis in his opinion said: “While a state may not lay a tax on the privilege of engaging in interstate commerce, *Sprout v. South Bend*, 277 U. S. 163, it may impose upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the

cost of constructing and maintaining them and of regulating the traffic thereon. . . . As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, . . . or by the express allocation of the proceeds of the tax to highway purposes, . . . or otherwise where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. . . .

"Being free to levy occupation taxes, states may tax the privilege of doing an intrastate bus business without regard as to whether the charge imposed represents merely a fair compensation for the use of their highways. . . . But since a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charges must be necessarily predicated upon the use made, or to be made, of the highways of the state. . . . In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even [fol. 155] with the number of passengers carried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses."

For two reasons, then, it is apparent that the imposition in question is not, and was not intended to be, exacted as compensation for use of state highways by interstate motor carriers. First, the act specifically provides that the funds derived shall be used for defraying the expenses of the board of Railroad Commissioners in administering the Motor Carriers Act. This court will take judicial notice of the fact that the building and maintenance of state high-

ways, and regulation of traffic thereon, is a function of the state highway department, and entirely foreign to the prescribed functions and powers of the Railroad Commission. Secondly, the amount and character of the attempted imposition bear no relation to the only purpose for which such imposition would be valid, that is, as compensation for use of the state highways. And this is so no matter which method is applied in determining the gross operating revenue. As in the Lindsey case, this exaction is proportioned only to the earnings of the vehicle. I think there can be no question but that the state has power, by appropriate legislation, to require compensation for the use of its highways by vehicles, engaged in interstate commerce. I further think that such legislation must emanate from the legislative arm of the state government. This court may, perhaps, point out that the state is overlooking a possible [fol. 156] source of revenue for the maintenance of its highways, but may not enact the legislation for the purpose of its collection, under the guise of judicial interpretation.

Edwin K. Cheadle, Associate Justice.

[fol. 157] IN THE SUPREME COURT OF MONTANA

JUDGMENT ENTERED IN MINUTE BOOK—June 29, 1946

This cause this day came on regularly for judgment and decision, whereupon, on consideration, it is hereby ordered and adjudged that the judgment of the court below entered on the 31st day of August, 1945, pertaining to section 3847.16, Revised Codes, is affirmed and the judgment of the same date pertaining to section 3847.27, Revised Codes, is remanded with directions to vacate and set aside such judgment, and enter judgment in favor of the Board. Opinion by Associate Justice Morris, Chief Justice Lindquist and Associate Justices Adair and Angstrom concurring. Associate Justice Cheadle reserves the right to concur or dissent.

IN THE SUPREME COURT OF MONTANA

ORDER DENYING PETITION FOR REHEARING ENTERED IN MINUTE
BOOK—September 19, 1946

It is hereby ordered that the dissenting opinion [Associate Justice Cheadle] in the above cause submitted this date be attached to and filed with the majority opinion therein.

Done this 19th day of September, 1946, Carl Lindquist, Chief Justice, C. F. Morris, Hugh R. Adair, Albert Angstman and E. K. Cheadle, Associate Justices.

It is further ordered that the petition for rehearing in the above entitled cause be denied.

Done this 19th day of September, 1946, Carl Lindquist, Chief Justice, C. F. Morris, Hugh R. Adair and Albert Angstman, Associate Justices.

[Vol. 158]

[File endorsement omitted]

IN THE SUPREME COURT OF MONTANA

[Title omitted]

PETITION BY AERO MAYFLOWER TRANSIT COMPANY FOR RE-
HEARING—Filed July 8, 1946

Comes now Aero Mayflower Transit Company, Respondent on the Appeal of the Board of Railroad Commissioners herein, and Appellant on the Cross-Appeal of Aero Mayflower Transit Company herein, and respectfully petitions for a rehearing en banc of all the issues on appeal before this Honorable Court, upon the following grounds:

(I) That a fact, material to the decision, was overlooked by the Court;

(II) That a question decisive of the case submitted by counsel was overlooked by the Court;

(III) That the decision is in conflict with an express statute to which the attention of the Court was not directed.

(IV) That the decision is in conflict with a controlling decision to which the attention of the Court was not directed.

[fol. 159]

STATEMENT

This Court, like all Courts operating in the Anglo-American tradition of a government of law and not a government of men, expressly recognizes that its opinions, expressions and decisions are not infallible. For that reason, and, also, because it desires the aid of litigants and counsel in the production of opinions resting on the integrity of reasoned internal structure, this Court has by its own rules, provided for rehearings, and petitions for rehearings in every case coming within its Rule XV. In the spirit of that rule the undersigned counsel files and presents this Petition for Rehearing, confident that this Court is desirous of withholding from the Montana Reports any expression or decision which is freighted with its own internal contradictions and misstatements of fact, as well as law, and which denies effect to the Federal Constitution.

Desirable as it may be for the Legislature to impose on an interstate motor carrier some form of taxation, constitutional in substance and effect, by way of compensation for the use of the highways of Montana, *it simply is not the business* of the judiciary to supply the imposition, and the absence of proper legislative action confers no such authority on the judiciary, nor do erroneous statements of fact or law supply such authority. The vice of the opinion, as counsel understands it, is that the Court under the mandate to uphold legislative enactments misreads that mandate to mean that *the court is required to supply legislative deficiencies*, i.e., the bricks of the wall, and not the judicial mortar of construction. And in supplying judicial mortar, the straw of erroneous factual assumptions corrupt the mass.

These appeals come to this Court after long, serious [fol. 160] and patient judicial review by the trial judge. Certainly, he was just as anxious "to vindicate the constitutionality of the statutes" as this Court. *He could not sustain the tax* on the gross revenue of the interstate operator from interstate operations only because it was a privilege tax merely, a tax on the bare privilege of carrying on interstate commerce, in violation of the Federal Constitution. He refused, by judicial amendments to legislate where the legislature had not done so, i.e., relate it to compensation for use of the highways, or to defray the expense of regulating motor traffic. And we submit that

nothing in this Court's opinion of June 29, 1946, overcomes or challenges the soundness of that conclusion. We first advert to the internal construction of the opinion.

A

Argument (Points 1 to 4 of Petition, inclusive)

UNTRUE AND INCORRECT STATEMENTS IN THE OPINION VITI-
ATING ITS RATIONALE

Every lawyer practicing before this Court owes to the Court the duty of pointing out untrue, incorrect or erroneous statements of fact or of law, or both, in the opinions emanating from the Court. This duty should be discharged by members of the bar irrespective of whether they are counsel in a given action. A fortiori, when they are counsel, and such erroneous statements are foundation material for erroneous conclusions.

(a) In the first paragraph of the opinion it is said:

"This controversy involves the question as to what extent a state may impose burdens in the way of licenses and taxes upon motor carriers engaged in interstate commerce for operating their vehicles over the highways of the state. Such exactions are imposed upon the presumption that the state owns the highways within its borders and the exactions are [fol. 161] imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways."

Passing over the fact that the carrier here is engaged solely in interstate commerce (as found in Par. 3 of the opinion) the statement that the taxes are exacted as compensation for the use of the highways,

"and the revenue derived therefrom shall be expended to build, maintain and supervise such highways,"

is not true as to the quoted words.

Sections 3847.16, 3847.17 and 3847.27 covering both the \$10.00 flat per vehicle tax and the $\frac{1}{2}$ of 1 per cent gross revenue tax, pass the tax to the motor carrier fund which

"shall be available for the purpose of defraying the expenses of administration of this Act (the Motor

Carrier Act)* and the regulation of the businesses herein described" (*Parenthesis our.)

Not one cent goes to build any Montana highway.

Not one cent goes to maintain any Montana highway.

Not one cent goes to supervise any Montana highway.

Surely, the Court does not desire such erroneous statements to stand. And yet they are the very foundation—the rationale—of the opinion, for that error is repeated again and again in the opinion, viz.,

In Paragraph 19, page 13, it is said:

"The foregoing authorities clearly establish the right of the state to impose upon motor carriers engaged in interstate commerce exactions by way of taxes and license for use by such motor carriers of the state highways when such exactions are necessary to build, maintain, and supervise the highways. In addition the exactions must be such as are reasonably necessary for the purposes mentioned, and must not be discriminatory as between state and interstate carriers."

In the next to the last paragraph of the opinion, page 21, it is said:

[fol. 162] "In the case at bar Montana owns the highways over which the company operates its vehicles and the taxes imposed are for the use of the state highways. The revenue collected is devoted to the building, repairing and policing of such highways, and that which the state furnishes is an aid, not a burden to interstate commerce."

The Board of Railroad Commissioners in this case never made any contention that the revenues from these license taxes were to be used for *building, maintaining or supervising highways*. The Board could not do so, and claim the fees. The revenue is for "*the expenses of administration of this act (Motor Carrier Act) and the regulation of the businesses herein described,*" a far different purpose than *highway building, repair and supervision*.

During the argument in open Court, it was made clear that the revenues from the taxes in question were not levied for, or in fact used for, or divested to highway construction, maintenance, repair and supervision. (And so, too, the Brief of Aero in this case. Appellant Aero pages 51, et seq.)

Thus, it is seen that the opinion begins and concludes on the erroneous statement that the revenues from these taxes are for highway building, repair and supervision. Surely, the Court will recall, on reading this petition, that revenues for highway building, repair and supervision come only from gasoline license taxes in Montana collected by the State Board of Equalization and administered by the Montana Highway Commission, and that the Board of Railroad Commissioners has nothing to do with such exactions.

The idea that these revenues attempted to be exacted from Aero are for highway construction, maintenance, repair and supervision, is so firmly fixed in the court's minds, [fol. 163] apparently, that the opinion cites *Interstate Transit vs. Lindsey*, 283 U. S. 183, 75 L. Ed. 953, in support of its reasoning. But in that case, Mr. Justice Brandeis, writing for the United States Supreme Court, invalidated a Tennessee statute for the very reason that the tax "was not," in the court's words, "exacted for such purposes," i.e., construction or maintenance of highways or bridges, "but merely as a privilege tax on the carrying on of interstate business." The Justice pointed out that in Tennessee, as in Montana, the revenues for highways came from other taxes. The case is a plain, unassailable authority for Judge Lynch's opinion. And yet the opinion in this case (Par. 19, page 13) uses it as authority to bolster the erroneous assumption that the Montana licenses are to build, maintain and supervise highways.

(b) Another statement, at once incorrect and misleading, is found in Paragraph 5 of the opinion, where it is stated: (Page 3)

"It appears that the Board has heretofore and for some years collected two separate exactions from the Company: The Registration License Tax authorized by sections 1760-1760.10, Revised Codes; and the tax on sales of gasoline, authorized by sections 2381.1 to 2396.9, Revised Codes."

Surely this Court does not desire to represent that the Board of Railroad Commissioners collects either,

(a) the registration fees collected by the Registrar of Motor Vehicles (Sections 1760-1760.10, R.C.M. 1935); or

(b) the gasoline license tax collected by the State Board of Equalization. (Sec. 2381.1-2396.9, R.C.M. 1935.)

What purpose can be subserved by the inclusion of this erroneous statement? Surely, the first erroneous utterance can not be bolstered by a second. The Board of Railroad Commissioners makes no claim to collect these taxes.

[fol. 164] These incorrect statements show very clearly the necessity for a rehearing in this action, for these factual errors make manifest that whatever the cause, the basic, material facts in the case remain obscure to the Court. And where the basic facts remain obscure, the legal conclusions are without foundation. If counsel for appellant Aero is in any way responsible for such errors, he now apologizes to the Court. But, upon rereading Aero's briefs, he does not find any such misstatements in the briefs.

B

The Internal Contradictions Vitiating the Opinion as Respects the Gross Revenue Tax

(a) In Paragraph 3, page 2 of the opinion, this Court clearly states the undisputed and indisputable fact that the operations of Aero Mayflower Transit Company are wholly interstate. The opinion says:

"There is no dispute as to the facts. The Company is engaged in the motor transportation of used or second hand household goods and office furniture from one state to another for hire. It does not transport any goods of any nature or kind from one point to another in the same state. *The only transportation it engages in, so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state.*"

In paragraph 25, page 17, of the opinion, the opinion states:

"By reading sections 3847.27 and 3847.16 together, which the rule on statutory construction enjoins, State v. Bowker, 63 Mont. 1, 205 Pac. 961, it becomes clear

that the clause in section 3847.27 imposing upon the company a tax of one half of one percent. based upon its 'gross operating revenue' that in the use of this phrase by the legislature the gross revenue derived from operations in Montana was intended and not the company's gross revenue from all sources. No other reasonable intention is conveyed by paragraph (b) of section 3847.16 which is as follows:

[fol. 165] 'When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state.' "

In paragraph 26, page 18 of the opinion, it is stated:

"It was said in *United States v. Freeman*, 3 Howard 565, (44 U. S. 548), 'A thing which is within the intention of the makers of the statute, is as much within the statute as if it were in the letter.' Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention to which we do not agree, *no difficulty would arise in putting into effect the minimum fee of \$15.00 required for each company vehicle operated within the state.*"

Thus the opinion, in one breath finds Aero's operations interstate only, and then in the next breath says that irrespective of that fact, Aero is liable for a minimum of a \$15.00 fee, even though it receives no revenue in Montana, and it would be liable for such excess over \$15.00 as the Commission might arbitrarily undertake to impose even though it did no business at all in Montana. If there must first be revenue from an operation in Montana before any part of this statute is applicable to the Aero Mayflower Transit Company, (and the undisputed fact is that it does

no business in Montana,) then the imposition of a minimum of \$15.00 for revenue tax becomes a privilege tax and nothing else. That is a wholly inconsistent attitude and should be corrected by our Supreme Court.

In other words, we submit that this Court must agree with the words of the statute and with both Aero and the Board in its interpretation that the tax under Section 3847.27 is a tax on gross operating revenue—without revenue there [fol. 166] can be no tax at all, for the legislature has laid the tax on revenue. The \$15.00 is not another flat per vehicle tax; (supplied by Section 3847.16) it is the minimum tax only when gross operating revenue is present, according to the court's language (Par. 25, page 17 of opinion) "the gross revenue derived by the company's operations in Montana." Now, since there are no operations in Montana, as the opinion concedes (Par. 3, page 2 of opinion) \$15.00 may not be taken from the operator just because it is easy to say "Give us \$15.00." The error in the opinion stems from the fact that the Court confuses the \$15.00 minimum exaction under a gross revenue tax where revenue is present, a mill, a cent, a dollar, or more, with a fee for operating a vehicle in the State, regardless of revenue from the operation. The \$15.00 is not a fee for operating a vehicle; it is a minimum fee upon gross revenues when $\frac{1}{2}$ of 1% of gross revenues do not amount to the sum of \$15.00. Operating fees are covered by the Registration License Tax administered by the Registrar of Motor Vehicles, by the Gasoline License Tax administered by the State Board of Equalization, and by Section 3847.16, imposing the flat \$10.00 fee "for every motor vehicle operated" by a motor carrier "over or upon the public highways of this State." Surely the Court will correct its opinion in this respect. It will not assume to hold the \$15.00 minimum of the gross revenue tax, a flat per vehicle operating tax. There must be revenue before any part of that tax is collectible.

The Court cites Justice Brandeis' language in *Interstate Transit, Incorporated vs. Lindsey*, 283 U. S. 183, 75 L. Ed. 953, wherein he said:

"While a state may not lay a tax on the privilege of engaging in interstate commerce,"

[fol. 167] but ignores that fundamental prohibition, by upholding as a tax on revenue from interstate commerce, a

\$15.00 exaction when there is no revenue from operations in Montana, and orders the wholly interstate operations of Aero to cease *if Aero does not pay \$15.00 from Montana revenues when there are no Montana revenues.* By such a ruling, Montana can effectually arrest and stop all interstate commerce across its borders.

Another misconception, related to the failure to grasp the true meaning of the \$15.00 minimum is found in Par. 8 of the opinion, where the Court says:

"The effect of the trial court's order enjoining the Board from enforcing any of the provisions of section 3847.27, Revised Codes, is to relieve the Company from the obligation to comply with the Board's demand to pay the tax of one-half of one percent of its gross revenue *or* the minimum fee of \$15.00 on each vehicle operated over the roads of the state." (*Italics ours.*)

The tax under Section 3847.27 is not in the alternative, i. e., $\frac{1}{2}$ of 1 per cent of gross revenue; *or* \$15.00 per vehicle operated; the \$15.00 is a proviso whereby a minimum in that amount is fixed if the application of the percentage factor does not produce more than \$14.9999.

We have demonstrated above that two facts material to the decision were overlooked by the Court in that no account of them was taken in final conclusion, i. e.,

(1) That no part of the (a) \$10.00 per vehicle flat fee, or (b) the gross revenue fee is destined for, or used for, the construction, maintenance, repair or supervision of the highway; and

(2) That Aero has no revenues from any "operations in Montana" for it operates in interstate commerce only.

Referring again to the second ground for rehearing, the question decisive of the case submitted by counsel, over-[fol. 168] looked by the court, is that the statute does not supply, the Board has not assumed to supply, and this Court does not supply, in its opinion, any yardstick whatever to "ascertain the gross revenue derived by the company's operations in Montana," which, the opinion says, is to be used "as a basis for the levy of the tax of one-half of one per cent."

What the opinion does not do, and what it does, as respects the gross revenue tax, is this:

It does not mention, or address itself to, or in any manner attempt to dispose of these cases from the Supreme Court of the United States, holding that the State may not tax interstate commerce as such, the right to engage in interstate commerce, or the gross receipts of purely interstate commerce transactions, viz.:

J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 82 L. ed. 1365;

Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015;

Fargó v. Michigan (Fargo v. Stevens), 121 U. S. 230, 30 L. ed. 888, 7 S. Ct. 857, 1 Inters. Com. Rep. 51;

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308;

Galveston, H. & S. A. R. Co. v. Texas, 210 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638;

Meyer v. Wells, F. & Co., 223 U. S. 298, 56 L. ed. 445, 32 S. Ct. 218;

Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 400, 57 L. ed. 1511, 1541, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18;

Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 S. Ct. 126;

United States Glue Co. v. Oak Creek, 247 U. S. 321, 328, 62 L. ed. 1135, 1141, 38 S. Ct. 499, Ann. Cas. 1918E, 748;

New Jersey Bell Teleph. Co. v. State Bd. of Texas and Assessments, 280 U. S. 338, 349, 74 L. ed. 463, 469, 50 S. Ct. 111;

Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 297 U. S. 650, 655, 80 L. ed. 956, 959, 56 S. Ct. 608;

[fol. 169] Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90, ante, 64, 58 S. Ct. 72;

Western Live Stock v. Bureau of Revenue, No. 322, October Term, 1937 (303 U. S. 250, ante, 823, 58 S. Ct. 546, 115 A. L. R. 944).

It ignores the decision of the Supreme Court of the United States uttered by Mr. Justice Hughes in a unani-

mous opinion, condemning a Montana tax on all business, interstate and intrastate, of a telephone company in *Cooney v. Mountain States Telephone and Telegraph Co.*, 79 L. Ed. 934.

The opinion ignores the long line of cases from this Court, the Supreme Court of Montana, recognizing and enforcing the above principles, in cases dealing with interstate commerce, cases directly in point.

State v. Great Northern Railway Co., 14 Mont. 381, 36 Pac. 458;

State v. Northern Pacific Express Co., 27 Mont. 419, 71 Pac. 404;

State v. Western Union Telegraph Co., 43 Mont. 445, 117 Pac. 93;

C. M. & St. P. Ry. Co. v. Swindlehurst, 47 Mont. 119, 130 Pac. 966;

J. I. Case Threshing Machine Co. v. Stewart, 60 Mont. 380, 109 Pac. 909;

C. M. St. P. & P. RR. v. Harmon, 89 Mont. 1, 295 Pac. 762;

Interstate Transit Co. v. Derr, 71 Mont. 222, 228 Pac. 624;

State v. Silver Bow Refining Co., 78 Mont. 1, 252 Pac. 301;

Fruitgrowers Express Co. v. Brett, 94 Mont. 281, 22 Pac. (2d) 171.

These holdings are in no manner affected by the fact that the commerce moves by rail instead of by truck. And the Derr case dealt with interstate movement by truck.

The opinion does, sub silentio, confess the weight of those cases, however, for it pares down Section 3847.27, the gross [fol. 170] revenue tax statute, which in terms applies to,

"the gross operating revenue of such carrier for the preceding three months of operation," etc. (Page 5)

to mean,

"the gross revenue derived from operations in Montana," (Page 17)

and by reference to sub-paragraph (b) of Section 3847.16, to mean,

"the gross revenue derived by the company's operations in Montana in order to use that as a basis for the levy of the tax of one-half of one per cent." (Page 17)

The opinion does, in substance, admit that this construction is a judicial gratuity, and unwarranted as such, for it says,

"Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention to which we do not agree," etc., and then proceeds to excuse the omission by saying "no difficulty" arises with reference to the \$15.00 minimum.

The minimum is merely the tail, not the hide.

Let us take the Court at its word and test the basis so found. Let us remember that the only transportation Aero engages in, as the opinion says, (Paragraph 3, page 2):

"... so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state."

The service may be paid for by consignor, by consignee, or by some third person. *Not one dollar of the payment may come from any source in Montana.* What is the business done in Montana? The Court says it is *transportation*, i.e., the movement of goods in a motor vehicle over the highways of the state.

(a) Where no dollar is received in Montana, what is the basis of apportionment of Aero's gross revenues, received [fol. 171] outside of Montana?

On Montana mileage against system mileage?

On mileage with load?

On mileage without load?

On a per vehicle basis? Loaded vehicles only? Or all vehicles loaded or empty?

(b) If a consignor or consignee in Montana pays for the interstate service, what is the basis of the apportionment of gross revenues?

The dollars originating in Montana against system gross dollars?

Weighted by any factor of highways use?

Weighted by any factor of mileage?

(c) What relation is there between "the gross revenue derived from operations in Montana," as the Court says, and "transportation" in Montana?

Who is to determine the basis of apportionment? The Board? *The legislature did not say so. The legislature did not say that the Board could select any method it pleases. The legislature did not say this Court could select the method. The legislature simply failed to provide a method and, accordingly, a workable law for gross revenue apportionment, assuming that it could within the Federal Constitution.*

The opinion really recognizes this condition, and in final analysis attempts to excuse it in this language:

"Furthermore; in this connection it is our opinion that when the legislature enacts a statute imposing the duty of enforcement of such statute upon a particular board or officer of the state but fails or neglects to clearly prescribe and incorporate in the Act the mode of enforcement, that such officer or board may adopt any fair and reasonable mode of enforcement designated to effectuate the purposes of the Act. In other words, when a duty is imposed upon a particular officer or board in express terms such other duties are implied as are necessary to carry into effect those that are expressed."

"Such, we think is the effect of the rule laid down in the case of Morse v. Granite County, 44 Mont. 78, [fol. 172] 119 Pac. 286, and followed in Fisher v. Stillwater County, 81 Mont. 31, 261 Pac. 607; Arnold v. Custer County, 83 Mont. 130, 269 Pac. 396, and State v. Stark, 100 Mont. 365, 52 Pac. (2d) 890.

That language has no support in the facts, and no support in the law.

No support in the facts—for the omission in the statute is not omission of a "mode of enforcement," but of a *method of taxation*.

No support in the law,—because the duty of apportionment is not a mere administrative rule-making authority,

but a duty of substantive law, not of a rule-making agency. And this Court, up to now, has uniformly insisted on the strict construction of taxing statutes:

Shubert v. Glacier County, 93 Mont. 160, 18 Pac. (2d) 614;

Vennekolt v. Lutey, 96 Mont. 72, 28 Pac. (2d) 452;

Mills v. State Board of Equalization, 97 Mont. 13, 33 Pac. (2d) 563;

State ex rel. Whitlock v. Board of Equalization, 100 Mont. 72, 45 Pac. (2d) 684;

Montana Life Ins. Co. v. Shannon, 106 Mont. 500, 78 Pac. (2d) 946;

Vantura v. Montana Liquor Control Board, 113 Mont. 265, 124 Pac. (2d) 569;

U. S. Gypsum Co. v. State Board of Equalization, 116 Mont. 275, 149 Pac. (2d) 774.

And See: Sutherland, Statutory Construction (3rd Ed. Horack) Ch. 67, Secs. 6701 and 6705.

None of the four (4) cases cited in the opinion are applicable, because none of them relate to the taxing power, or present a situation where an administrative tribunal is permitted to invent a method of tax apportionment, or to select between possible methods of tax apportionment, or authorize the court to change the words of a statute.

In the Morse case, 44 Mont. 78, it was shown that the [fol. 173] Board of County Commissioners had express statutory authority to build a Court House, and, also, to issue bonds.

In the Fisher case, 81 Mont. 31, the Court found that "the law authorizes the expenditures," and this finding is supported by the most explicit terms of the statute itself.

In the Custer County case, 83 Mont. 130, this Court pointed out that the express terms of the statutes gave the County Board implied authority for its acts, saying of the statutes, "We do the italicizing and direct special attention to the italicized words."

In the Stark case, 100 Mont. 365, the plumbing board was told by the statute to give examinations to would-be plumbers and complaint was made that there were no standards specifying the nature of the examination. The Court found that the Act itself indicated the nature of the examination by requiring examiners to be versed in modern

sanitary plumbing and sewage and applicants to be examined on their fitness to engage in the business.

But Section 3847.27, in express terms, commands the Board to lay a tax on

"the gross operating revenue of such carrier."

The statute commands that, and that alone. It is not a question of the statute omitting to fill in details. The question is, has the Board the authority to do what the statute commands it not to do, i. e.,

"to lay a tax on anything less than 'the gross operating revenue' "?

The opinion says "*yes . . . the Board can lay a tax on Montana revenues only, and it can follow any method it pleases to determine what are Montana revenues.*"

That is the vice of the opinion—that the Board can invent [fol. 174] any method it pleases to determine what are gross operating revenues in Montana. We challenge counsel to produce a single case upholding such a conclusion.

Since the \$10.00 flat per vehicle tax laid under Section 3847.16 is not laid for construction, maintenance, repair or supervision of highways, but solely because Aero operates a motor vehicle over the highways—irrespective of any revenue accruing from the operation—it is obvious that it, too, is a mere tax for the privilege of operating in a motor vehicle in interstate commerce and as such falls under the very language of Justice Brandeis quoted by the Court in the opinion.

Conclusion

In conclusion, it is respectfully submitted that a complete rehearing of all the issues herein should be had because,

I. The opinion is built on misstatements of fact, and consequent misconceptions of law, which, when removed and excised from the opinion, as they must be in the light of the true facts, leave the opinion without any foundation upon which to stand; and,

II. There is no authority in reason, in law, or in judicial precedent, for this Court, or any other American Court, holding that an administrative tribunal has the power on its own motion to invent a method, formula, or rule for apportionment of a tax when the legislature has com-

manded that no apportionment is to be attempted, and in any case, has set no standard, rule or formula for any apportionment.

III. The decision of Judge Lynch should be affirmed, for if that is not done the doctrine of non-delegability of [fol. 175] the power to tax is nullified, and an administrative tribunal given the power to invent a tax which only the legislature may do, consistent with the Federal and State Constitutions.

Submitted with respect, and in confidence that the Court desires naught but truth in its opinions.

Edmond G. Toomey, Attorney for Petitioner.

Service of the foregoing petition for rehearing, and receipt of a true copy thereof, is admitted this 8th day of July, 1946.

Edwin S. Booth, Sec.-Counsel, Attorneys for Board of R. R. Commissioners.

[fol. 176] IN THE SUPREME COURT OF MONTANA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed September 19, 1946

The petition for rehearing in the above entitled cause is hereby denied.

Done this 19th day of September, 1946.

Carl Lindquist, Chief Justice. C. F. Morris, Hugh R. Adair, Albert H. Angstman, Associate Justices.

[File endorsement omitted.]

[fol. 177]

{File endorsement omitted}

IN THE SUPREME COURT OF MONTANA

[Title omitted]

CERTIFIED COPY OF JUDGMENT ON REMITTITUR, RETURNED BY
DISTRICT COURT TO SUPREME COURT—Filed December 16,
1946

[fol. 178] IN THE DISTRICT COURT OF THE SECOND JUDICIAL
DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY
OF SILVER BOW

No. 38175

BOARD OF RAILROAD COMMISSIONERS of the State of Montana,
Paul T. Smith, Horace F. Casey and Austin B. Middleton,
as members of and constituting the Board of Railroad
Commissioners of the State of Montana, Plaintiffs,

VS.

AERO MAYFLOWER TRANSIT COMPANY a corporation,
Defendant

JUDGMENT ON REMITTITUR—Filed October 28, 1946

Whereas, on the 31st day of August, 1945, an Amended Judgment was entered in the above entitled cause and both parties having appealed from said Amended Judgment and the portion thereof adverse to each of them, to the Supreme Court of the State of Montana, and remittitur of said Court having been filed herein on the 21st day of September, 1946, and it appearing that "The judgment of the lower court in restraining the Company from operating its vehicles over the highways of Montana until it shall have paid the exactions imposed pursuant to section 3847.16 Revised Codes, as set out in such judgment, is affirmed, and that as to the order of the lower court contained in said judgment restraining the Board from enforcing the exactions imposed upon the Company by section 3847.27, Revised Codes, the cause is remanded with instructions to vacate and set aside such order, and enter judgment in favor of the Board in accordance with this opinion."

Now therefore, by reason of the law and the remittitur [fol. 179] aforesaid, it is hereby ordered, adjudged and decreed:

1. That the defendant be, and it hereby is, restrained and enjoined from operating its motor vehicles over and upon the public highways of the State of Montana until it has paid to the plaintiff, Board of Railroad Commissioners of the State of Montana, the sum of Two Hundred Fifty Dollars (\$250.00), together with interest thereon from the 1st day of January, 1938 until paid; the sum of Four Hundred Dollars (\$400.00), together with interest thereon, from the 1st day of January, 1939 until paid; and the sum of Four Hundred Forty Dollars (\$440.00) together with interest thereon, from the 1st day of January, 1940 until paid, being the fees due for the years 1937, 1938 and 1939, respectively, under the provisions of Section 3847.16, Revised Codes of Montana, 1935.

2. That the defendant be, and it hereby is, restrained and enjoined from operating its motor vehicles over and upon the public highways of the State of Montana until it has paid to the plaintiff, Board of Railroad Commissioners of the State of Montana, the sum of Sixty-four and 11/100 Dollars (\$64.11) together with interest thereon, from the 1st day of January, 1937 until paid; the sum of Three Hundred thirty-three and 99/100 Dollars (\$333.99) together with interest thereon from the 1st day of January, 1938 until paid; the sum of Six Hundred Dollars (\$600.00) together with interest thereon from the 1st day of January, 1939 until paid; and the sum of Six Hundred Sixty Dollars (\$660.00), together with interest thereon from the 1st day of January, 1940 until paid, being the fees due for the years 1936, 1937, 1938 and 1939, respectively, under the provisions of Sections 3847.27, Revised Codes of Montana, 1935.

Done in Open Court this 28th day of October, 1946.
[fol. 180]

Jeremiah J. Lynch, Judge.

[Clerk's certificate to foregoing paper omitted in print-
ing.]

[fol. 181]

[File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

**PETITION FOR APPEAL AND ASSIGNMENT OF ERRORS—Filed
December 16, 1946**

[fol. 182] To The Hon. Carl Lindquist, The Chief Justice
of the Supreme Court of the State of Montana:

Your petitioner, Aero Mayflower Transit Company, a
corporation, respectfully shows:

1. The petitioner, Aero Mayflower Transit Company, a
corporation organized and existing under the laws of the
State of Kentucky, is the defendant and the appellant in
the above entitled cause.

2. Petitioner feeling itself aggrieved by the final judgment and decree in and of the Supreme Court of the State of Montana entered therein on the 19th day of September, 1946, after denial by said court on September 19, 1946, of its petition for rehearing, now for the reasons set forth in its Assignment of Errors which is filed herewith, hereby appeals from such final judgment and decree of the Supreme Court of the State of Montana, to the Supreme Court of the United States, and prays that its appeal be [fol. 183] allowed and that the final judgment and decree of the Supreme Court of the State of Montana be reversed and set aside and that judgment be entered in favor of petitioner, appellant as aforesaid, and to that end that a citation be issued in accordance with law and that a transcript of the record, proceedings and exhibits in this cause, duly authenticated by the clerk of the Supreme Court of the State of Montana, under the seal of said Court, may be sent to the Supreme Court of the United States as provided by law; and that an order be made fixing the terms and the amount of bond or other security to be required of your petitioner; and that the execution of said judgment be superseded until final determination of said appeal by the Supreme Court of the United States.

Jurisdiction of the Supreme Court of the United States on appeal is invoked under section 237 (a) of the Judicial Code (28 U.S.C.A., sec. 344 (a)), as amended.

The final judgment and decree of injunction restraining the petitioner from operating in *interstate commerce* over the highways of the State of Montana from which judgment and decree an appeal is sought, was rendered in a suit in the highest court of Montana, in which a decision could be had, namely, the Supreme Court of the State of Montana. In that suit there was drawn in question the validity of two separate groups of statutes of the State of Montana, on the ground that each was repugnant to the Constitution of the United States of America, and the decision of the Supreme Court of the State of Montana was in favor of the validity of each of said groups of statutes. The opinion of the Supreme Court of the State was concurred in by four (4) of the five (5) Justices of that Court. One Justice reserved his opinion at the time the majority opinion was [fol. 184] filed, and subsequently filed a dissenting opinion.

The basic suit grew out of an administrative proceeding against petitioner commenced September 19, 1939, by the Board of Railroad Commissioners of the State of Montana, wherein such Board assumed by its order issued October 9, 1939, to cancel and extinguish a "permit" theretofore issued to petitioner by said Board on October 3, 1935, authorizing petitioner to operate in interstate commerce over the highways of Montana, because of the failure of petitioner to pay two (2) different kinds of fees or taxes for the years 1937, 1938 and 1939 (in addition to all other licenses, fees and taxes imposed upon motor vehicles in Montana by successive Acts of the legislative assembly of Montana), in consideration of the use of the public highways of the State, viz.,

First Tax, an annual fee or tax of \$10.00 "for every motor vehicle operated by the carrier over or upon the public highways of this state", as enacted in sections 16, 17 and 18 of Chapter 184, Laws of Montana, 1931; now codified as sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935, Volume 2, pages 688-689; and

Second Tax, a quarterly fee or tax of one-half of one per cent of the gross operating revenue of the carrier, with a minimum \$15.00 annual fee, as enacted in sections 2 and 3 of Chapter 100, Laws of Montana, 1935, now codified as sections 3847.27 and 3847.28, Revised Codes of Montana, 1935, Volume 2, pages 691-692.

Each of the statutes expressly states that the taxes named are "in addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state" or "in addition to all [fol. 185] the other licenses, fees and taxes imposed upon motor vehicles in this state."

Petitioner, who operated, and operates, exclusively in interstate commerce, challenged the application and the constitutionality, under the United States Constitution, of both these taxes in the proceeding before the Board. The Board followed its order assuming to prohibit petitioner from operating in interstate commerce over Montana highways by commencing suit on October 13, 1939, in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, at Butte, as plaintiff, against Aero Mayflower Transit Company as defendant, petitioner here, to secure an injunction prohibiting petitioner from operating its motor vehicles in interstate commerce upon any public highways in the State of Montana until it paid both kinds of taxes to the Board for the years in question. Petitioner Aero challenged the complaint of the Board by demurrers and in answer, by denials, affirmative defenses, and a cross-complaint in which petitioner asserted (a) that the statutes were not intended to apply to its operations which were exclusively in interstate commerce, and (b) that if the statutes were to be so construed they were, and each was, repugnant to the commerce clause, and to the due process and to the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

After trial, the District Court of Silver Bow County, on August 31, 1945, found and adjudged:

1. That the annual tax of \$10.00 per vehicle "is a valid exercise of the legislative authority and should be obeyed";

2. That the quarterly tax on the gross revenues of the carrier "is invalid for the reason that it fails to [fol. 186] specify any method by which the gross operating revenue of the defendant (petitioner) in the state for any year may be determined," and for the further reason that the Public Service Commission of the State of Montana, the administrative body collecting the fee "has nothing to do with the regulation and supervision

of motor carriers using the public highways of the State of Montana."

Judgment was entered *restraining the Company*, petitioner here, from operating in interstate commerce over the highways of Montana until it pays the \$10.00 per vehicle tax for the years 1937, 1938 and 1939, and, on the other hand, *restraining the Board* from attempting to apply the gross revenue tax to petitioner.

The Board appealed to the Supreme Court of Montana from that part of the judgment holding the gross revenue tax invalid, and the Company appealed from that part of the judgment holding the flat \$10.00 per vehicle tax valid. In the Supreme Court the Company again attacked both statutes as repugnant to the commerce clause, and to the due process and equal protection clauses of the Fourteenth Amendment, Constitution of the United States.

In an opinion delivered June 29, 1946, — Mont. —, 172 Pac. (2d) 452, the Supreme Court of the State of Montana (four Justices concurring and one reserving opinion, which was, when delivered on September 19, 1946, a dissent from the views and ruling of the majority) held that both of the statutes imposed valid taxes, and that neither offended the Constitution of the United States or the State of Montana and (a) *affirmed* the judgment of the District Court of Silver Bow County as to the "flat" \$10.00 per vehicle annual tax, and (b) *reversed* the judgment of that court as [fol. 187] to the gross revenue tax with directions to set aside such judgment and enter judgment in favor of the Board for the gross revenue tax.

Petition for rehearing was seasonably filed by the Company, petitioner here, on July 8, 1946, and, after issue thereon made by answer of the Board thereto, filed July 15, 1946, denied on the merits by final judgment of the Supreme Court of Montana, entered September 19, 1946, after which the mandate of said Supreme Court was, on remittitur, sent to the District Court of Silver Bow County, Montana, which complied therewith by judgment entered October 28, 1946, restraining the Company, petitioner here, from operating in interstate commerce over the highways of Montana until it paid both taxes for the years 1937, 1938 and 1939, being the years involved in the litigation.

ASSIGNMENT OF ERRORS

Petitioner, in support of its Petition for Appeal herein, assigns the following errors as grounds for the reversal of the final judgment and decree of the Supreme Court of the State of Montana of September 19, 1946:

A

As respects the "flat" or "straight" \$10.00 per vehicle annual tax imposed by sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935:

I

The Supreme Court of the State of Montana erred in holding that the tax assailed is not in violation of the commerce clause of, and also, the due process clause of the Fourteenth Amendment to, the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until the tax is paid.

[fol. 188]

II

The Supreme Court of the State of Montana erred in holding that the tax assailed is not in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until the tax is paid.

III

The Supreme Court of the State of Montana erred in gratuitously reading into section 3847.16, Revised Codes, Montana, 1935, and its related section 3847.17, the assumption that the tax was exacted to build, maintain and supervise the highways of Montana and using that assumption to justify the exaction against petitioner, engaged exclusively in interstate commerce, when the said statutes expressly negative any such purpose.

IV

The Supreme Court of Montana erred in sustaining the "flat" or "straight" \$10.00 per vehicle tax as a direct burden on interstate commerce, and prohibiting petitioner from operating exclusively in interstate commerce unless

such tax is paid, since the tax *on its face* bears no relation whatever to the use of the public highways of the State of Montana by petitioner.

V

The Supreme Court of Montana erred in sustaining the "flat" or "straight" \$10.00 per vehicle tax, the proceeds of which, by the words of section 3847.17, Revised Codes of Montana, 1935, "shall be available for the purpose of defraying the expenses of the administration" of the Montana Motor Act "and the regulation of the businesses herein described," as against petitioner, who operates in [fol. 189] interstate commerce only, since the tax *on its face* bears no relation to the asserted uses or purposes of its levy.

VI

The Supreme Court of Montana erred in sustaining the "flat" or "straight" \$10.00 per vehicle tax as compensation for the use of the highways of Montana, when the tax is by its terms and necessary effect, and despite its self-serving pretensions, is a direct state tax levied for the privilege of carrying on interstate commerce over the public highways of Montana.

VII

The Supreme Court of Montana erred in applying the "flat" or "straight" tax of \$10.00 per vehicle against petitioner's exclusive interstate operations, since the tax on its face is not in any manner related to or apportioned to, such operation.

VIII

The Supreme Court of Montana erred in mis-reading and in mis-applying to the Montana statutes in question, sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935, the decisions of the Supreme Court of the United States in,

Clark v. Poor, 274 U. S. 554, 47 Sup. Ct. 702, 71 Law Ed. 1199;

Interstate Transit, Incorporated, v. Lindsey, 283 U. S. 183, 51 Sup. Ct. 380, 75 Law Ed. 953; and

South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177, 58 Sup. Ct. 510, 82 Law Ed. 734.

IX

The Supreme Court of Montana erred in holding that sections 3847.16, 3847.17 and 3847.18 are applicable to interstate commerce, or petitioner's exclusive interstate operations at all.

B

[fol. 190] *As respects the Quarterly Gross Revenue tax on the interstate carriers' Gross revenues, imposed by sections 3847.27 and 3847.28, Revised Codes of Montana, 1935:*

I

The Supreme Court of Montana erred in holding that the quarterly gross revenue tax assailed is not in violation of the commerce clause of, and, also of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until such tax is paid.

II

The Supreme Court of Montana erred in holding that the quarterly gross revenue tax assailed is not in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until such tax is paid.

III

The Supreme Court of Montana erred in holding that the State of Montana has power, as a condition of permitting petitioner to engage in interstate commerce over the public highways, to impose a tax upon petitioner who operated over its public highways exclusively in interstate commerce, based upon gross receipts to petitioner derived solely from interstate commerce, absent any attempt by the legislature at apportionment, a method, formula or device, for apportionment.

IV

The Supreme Court of Montana erred (a) in gratuitously assuming, in the face of section 3847.27, Revised Codes, Montana, 1935, stating that the tax is imposed on the gross operating revenue of the carrier, that the tax is [fol. 191] imposed only on "gross revenue derived from

operations in Montana," however determined, and (b) in itself endeavoring to invent or supply a taxable base of gross revenues as between Montana and the national area outside Montana, when the statute refers to "the gross operating revenue of the carrier," i. e., this petitioner's total interstate revenues, as the taxable base.

V

The Supreme Court of Montana erred in holding that the State of Montana has power to levy a tax on the interstate revenues of a carrier engaged exclusively in interstate commerce, as a condition of that carrier operating over the highways of Montana, when the legislative assembly has utterly failed to provide, any method whatever of relating the tax to the use, and permits a Board or unidentified persons to invent any method of apportionment in any single instance.

VI

The Supreme Court of Montana erred in gratuitously assuming, as a premise to its conclusion upholding the gross revenue tax that there are gross revenues derived by petitioner "from operations in Montana" to which the tax could be made to apply, in the face of the fact as found by said court, that petitioner operates exclusively in interstate commerce, and derives its revenues solely from that commerce, and, on such gratuitous assumption, prohibiting petitioner from operating in interstate commerce.

VII

The Supreme Court of Montana erred in upholding the validity of the gross revenue tax against the challenge of the constitutional objections made by petitioner *when the Act utterly fails to provide, or to suggest, any method of [fol. 192] apportionment between "gross revenue derived from operations in Montana" and gross revenue elsewhere.*

VIII

The Supreme Court of Montana erred in its attempt to immunize the statute against the constitutional objections, in that, under the guise of statutory construction, it assumed to legislate into the statute a restriction confining the operation of the gross revenue tax to "gross revenue

derived from operations in Montana," when the legislative assembly by the words of the statute applied the tax to "the gross operating revenue of the carrier", and the Supreme Court of the United States can not be bound by any such perversion of language.

LX

The Supreme Court of Montana erred in that, after assuming to legislate into the statute a restriction confining the operation of the tax to "gross revenue derived from operations in Montana," it found no method provided in the statute for ascertaining such alleged Montana revenues, i.e., by road mileage traveled in the state, number of vehicles, road hours, cargo, volume of traffic, ton miles, vehicle miles, or any other factor or combination of factors, *and yet enjoined petitioner from operating exclusively in interstate commerce until it paid a tax which could not be ascertained, except by guesswork by some unidentified agency.*

X

The Supreme Court erred in that it finally concluded that the \$15.00 minimum per vehicle annual tax imposed *by the gross revenue statute* could be put into effect "even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is [opinion apparently omits language here] not provided", thus making such tax an arbitrary minimum charge for the naked privilege of engaging in interstate commerce, in violation of the commerce clause and the Fourteenth Amendment to the Constitution of the United States.

XI

The Supreme Court of Montana erred in holding that petitioner, engaged exclusively in interstate commerce, may be subjected to a percentage tax on gross revenues, as a condition of using the public highways of Montana in interstate commerce, when no formula, guide, standard or measure of tax is stated by the statute, or when no agency of the State is delegated authority, under legislative safeguards, to compute such tax on stated or ascertainable factors.

XII

The Supreme Court of Montana erred in construing sections 3847.27 and 3847.28, Revised Codes of Montana, 1935, to be applicable to interstate commerce, at all:

Wherefore, and because of such errors, appellant prays:

1. That this Petition for Appeal be allowed, and Citation issue to Appellee, as aforesaid;

2. That said final decision, judgment and decree of the Supreme Court of the State of Montana, entered September 19, 1946, be reversed and until final determination hereof, said judgment be stayed and superseded;

3. That each of the groups of statutes assuming to impose the several taxes assailed be declared unconstitutional, as being repugnant to the commerce clause, to the equal protection of the law clause, to the due process clause, of the Fourteenth Amendment to the Constitution of the United States, and clause 3 of section 8 of Article I of the Constitution of the United States;

4. That the Clerk of the Supreme Court of the State of [fol. 194] Montana be directed to prepare and certify a Transcript of the Record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within a time to be fixed as required by law;

5. Appellant herewith tenders bond, in such terms and sum as the Court may require in the premises responsive to the prayer hereof, and prays approval thereof.

Done and dated at Helena, Montana, this 16th day of December, 1946, and filed in said Supreme Court of Montana and presented to the Chief Justice thereof on said 16th day of December, 1946:

Edmond G. Toomey, Helena, Montana; Emmett S. Huggins, Indianapolis, Indiana, Attorneys for Petitioner.

• [fols. 195-266] • [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL AND FIXING BOND ON STAY—Filed
December 16, 1946

It appearing to the undersigned that the defendant, Aero Mayflower Transit Company, a corporation, has filed its petition for appeal to the Supreme Court of the United States from the final judgment and decree of injunction of the Supreme Court of Montana in the above entitled cause, and has filed therewith its Assignment of Errors, Prayer for Reversal, and for Stay of Proceedings on said Judgment, and also its Statement as to the Jurisdiction of the Supreme Court of the United States, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment and decree of injunction in question, all as provided by the applicable statutes and the rules of said Supreme Court of the United States, and the petitioner's Assignment of Errors and [fol. 267] Statement having been presented to the undersigned as required,

It is Ordered, and this does Order that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the final judgment and decree of injunction of the Supreme Court of Montana rendered in this cause, dated on the 19th day of September, 1946, and that defendant, as appellant, give a bond with good and sufficient security in the sum of Twenty Thousand Dollars (\$20,000) that it, as appellant shall prosecute its appeal to effect, and answer all damages and costs if it fail to make the appeal good, to be approved by the undersigned.

It is further Ordered, and this does Order that all proceedings on said final judgment be, and they are hereby arrested and stayed until the final determination of said appeal, on mandate from the Supreme Court of the United States to the Supreme Court of Montana.

It is further Ordered and this does Order, that the Clerk of the Supreme Court of the State of Montana shall within

sixty (60) days from this date, make and transmit to the Supreme Court of the United States, under his hand and the seal of the Supreme Court of Montana, a true copy of the material parts of the record, including the assignment of errors and any opinions delivered in the case, said record to be designated by praecipe, or stipulation, of counsel for appellant and appellees, all in accordance with Rule X of the Rules of the Supreme Court of the United States.

Done and dated this 16th day of December, 1946.

Carl Lindquist, Chief Justice of the Supreme Court
of the State of Montana.

[fols. 268-270] Supersedeas bond on appeal for \$20,000.00, approved and filed Dec. 16, 1946, omitted in printing.

[fols. 271-272] Citation in usual form, filed Dec. 16, 1946, omitted in printing.

[fols. 273-293] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE, FOR INCLUSION IN THE RECORD OF JUDGMENT OF
DISTRICT COURT—Filed January 13, 1947

To the Honorable the Clerk of the Supreme Court of the
State of Montana:

The Appellees hereby request the incorporation into the transcript of the record on this appeal, the attached certified copy of the judgment of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, made and rendered on the 3rd day of January, 1947, which said judgment cancels the judgment

of the District Court, dated October 28, 1946, and appearing on pages 159 and 160 of the record.

[fol. 294] Dated this 8th day of January, 1947.

R. V. Bottomly, ESB, Attorney General of the State of Montana; Clarence Hanley, ESB, Asst. Attorney General of the State of Montana; Edwin S. Booth, Special Assistant Attorney General and Secretary-Counsel, Board of Railroad Commissioners of the State of Montana.

Acknowledgment of service of the foregoing Praecipe admitted and receipt of copy acknowledged, this 13th day of January, 1947.

Emmett S. Huggins, Edmond G. Toomey.

[fol. 295] IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF SILVER BOW.

Cause No. 38175

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, Paul T. Smith, Leonard C. Young and Horace F. Casey, as members of and constituting the Board of Railroad Commissioners of the State of Montana, Plaintiffs,

vs.

AERO MAYFLOWER TRANSIT COMPANY, a corporation,
Defendant

JUDGMENT ON REMITTITUR

Whereas, on the 31st day of August, 1945, an Amended Judgment was entered in the above entitled cause and both parties having appealed from said Judgment and the portion thereof adverse to each of them, to the Supreme Court of the State of Montana, and remittitur of said Court having been filed herein on the 21st day of September, 1946, and it appearing that "The judgment of the lower court in restraining the Company from operating its vehicles over the highways of Montana until it shall have paid the exactions imposed pursuant to section 3847.16, Revised Codes, as set out in such judgment, is affirmed. As to the

order of the lower court restraining the Board from enforcing the exactions imposed upon the company by section 3847.27, Revised Codes, the cause is remanded with instructions to vacate and set aside such order, and enter judgment in favor of the Board in accordance with this opinion."

And whereas, a Judgment on Remittitur was made and entered on the 28th day of October, 1946, and subsequently, [fol. 296] by a Peremptory Order of the Supreme Court of the State of Montana, dated the 31st day of December, 1946, the lower Court was ordered to vacate and cancel its judgment made and rendered on the 28th day of October, 1946 and to enter judgment in conformity therewith.

And Whereas, the temporary restraining order heretofore issued was set aside and vacated by order of this Court, made and entered on the 5th day of December, 1939, on the condition that the defendant Company file a bond to secure payment to the plaintiff, Board of Railroad Commissioners, and/or the State of Montana, "any and all fees involved in this action and any and all fees which shall accrue during the pendency of the litigation consequent thereon, the payment of which shall, on final determination of said litigation be determined to be due and owing by the defendant to said plaintiff and/or the State of Montana, under the provisions of Section 3847.16 and 3847.27, Revised Codes of Montana, 1935, if at all;" and after filing security as required, the defendant company was authorized by the Court to, and it did operate its motor vehicles over the highways of the State of Montana, and the fee due under the provisions of Sections 3847.16 and 3847.27, Revised Codes of Montana, 1935, for such subsequent operations are due, owing and wholly unpaid.

Now, Therefore, by reason of the law, the remittitur and order aforesaid, It Is Hereby Ordered, Adjudged and Decreed:

1. That the Amended Judgment made and entered in this Court on the 31st day of August, 1945, and the Judgment on Remittitur made and entered on the 28th day of October, 1946, be, and they are hereby set aside and superseded by this Judgment.

[fol. 297] 2. That the defendant be, and it hereby is, restrained and enjoined from operating its motor vehicles over and upon the public highways of the State of Montana

until it has paid to the plaintiff, Board of Railroad Commissioners of the State of Montana, the sum of Two Hundred Fifty Dollars (\$250.00), together with interest thereon from the 1st day of January, 1938 until paid; the sum of Four Hundred Dollars (\$400.00), together with interest thereon from the 1st day of January, 1939 until paid; the sum of Four Hundred Forty Dollars (\$440.00), together with interest thereon from the 1st day of January, 1940 until paid, being the fees due for the years 1937, 1938, and 1939, respectively, under the provisions of Section 3847.16, Revised Codes of Montana, 1935; and until it has made report to the plaintiff Board, showing the vehicles operated on the highways of the State of Montana in the year of 1940, and each subsequent year, and paid to the plaintiff Board the fees due and owing under the provisions of Section 3847.16, Revised Codes of Montana, 1935, together with interest thereon from the 1st day of January following, on the sums due for each said year; and until it has made full compliance with the provisions of Section 3847.16, Revised Codes of Montana, 1935.

3. That the defendant be, and it hereby is restrained and enjoined from operating its motor vehicles over and upon the public highways of the State of Montana until it has paid to the plaintiff, Board of Railroad Commissioners of the State of Montana, the sum of Sixty-four and 02/100 Dollars (\$64.02), together with interest thereon from the 1st day of January, 1938 until paid; the sum of Six Hundred Dollars (\$600.00), together with interest thereon from the 1st day of January, 1939 until paid; the sum of Six Hundred Sixty Dollars (\$660.00), together with interest thereon from [fol. 298] the 1st day of January, 1940 until paid, being the fees due for the years 1936, 1937, 1938 and 1939, respectively, under the provisions of Section 3847.27, Revised Codes of Montana, 1935; and until it has made report to the plaintiff Board, showing the vehicles operated on the highways of the State of Montana in the year of 1940, and each subsequent year, and paid to the plaintiff Board the fees due and owing under the provisions of Section 3847.27, Revised Codes of Montana, 1935, together with interest thereon from the 1st day of January following, on the sums due for each said year; and until it has made full compliance with the provisions of Section 3847.27, Revised Codes of Montana, 1935.

4. That plaintiff have and recover its costs expended herein in the sum of One Hundred Eighty-seven and 25/100 Dollars (\$187.25).

Dated this 3rd day of Jan., 1947.

Jeremiah J. Lynch, District Judge.

Clerk's Certificate to foregoing paper omitted in printing.

[File endorsement omitted.]

[fols. 299-301] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

CERTIFICATE OF CLERK OF SUPREME COURT OF MONTANA TO
TRANSCRIPT OF RECORD ON APPEAL

UNITED STATES OF AMERICA,

State of Montana, ss:

I, Frank Murray, undersigned, the duly and regularly elected, qualified and acting Clerk of the Supreme Court of the State of Montana, wherein the above entitled action was finally determined by final judgment of said Court, *Do Hereby Certify:* That I have carefully compared the foregoing Transcript of Record on Appeal from the Supreme Court of the State of Montana to the Supreme Court of the United States, consisting of Index to Transcript, being Pages (i) to (iii), inclusive, and Transcript of Record, being pages 1 to 306, inclusive, wherein is incorporated Statement by Appellant as to Jurisdiction Under Rule 12, with Appendices "A" and "B" thereto at Pages 195 to 265, and Statement by Appellees of Grounds in Opposition to Appellate Jurisdiction Pursuant to Rule 12, with Appendix, at Pages 275 to 291, with the original papers and documents in said cause on file and of record in my office, and in my custody therein, and that said Transcript of Record is [fol. 302] a full, true and correct copy of all the said original papers and documents, and of each one thereof in said cause, so filed and of record in my office of Clerk of the Supreme Court of the State of Montana, as required to be incorporated in said transcript pursuant to praecipe of appellant found at pages 304-5 of said transcript, and as required by

Rules 10 and 12 of the Revised Rules of the Supreme Court of the United States.

I further certify that the Honorable Carl Lindquist, Chief Justice of the Supreme Court of the State of Montana, who was the Justice of said Court allowing said appeal and who signed the citation on appeal, has taken proper security for costs and for stay on appeal consisting of a good and sufficient supersedeas bond in the sum of Twenty Thousand (\$20,000.00) Dollars, the original bond being on file in my said office, all as required by Rule 36 of the Revised Rules of the Supreme Court of the United States, and that all further proceedings on the final judgment of the Supreme Court of Montana in said cause have been stayed pending final determination of said appeal.

I further certify that the practice before, and the rules of, the Supreme Court of the State of Montana are such that on appeal to said Court from the district courts of said state, the appellant makes and assigns specifications or assignments of error in the brief of appellant, and that, accordingly, excerpts from the briefs of appellants (each party having been an appellant in said Supreme Court of Montana) containing such specifications or assignments of error are incorporated into this transcript, at pages 128C, 128D and 128E.

In witness whereof, I have hereunto set my hand and [fol. 303] affixed the seal of the Supreme Court of the State of Montana, at Helena, the capital of said State, this 5th day of February, 1947.

Frank Murray, Clerk of the Supreme Court of the State of Montana. (Seal of Supreme Court of State of Montana.)

[fol. 304]

[File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR PORTIONS OF RECORD TO BE INCORPORATED IN
TRANSCRIPT ON APPEAL—Filed December 16, 1946

To the Honorable, the Clerk of the Supreme Court of the State of Montana:

The appellants hereby indicate the portions of the record to be incorporated into the transcript of record on this

appeal, and request that you proceed to prepare said record including all the portions now designated, viz:

1. The complete Transcript of Record on Appeal to the Supreme Court of Montana from the District Court of Silver Bow county, Montana, together with all exhibits and Bills of Exception, *excluding, however, the index to said transcript, and all routine, interim orders of the trial court setting time for hearings, continuing hearings, granting additional time to the parties, and omitting as to any paper [fol. 305] after the complaint, repetition of the full title of Court and Cause; and appellant's Assignment of Errors in its Brief in the Supreme Court of Montana.*

2. Opinion and decision of the majority of the Supreme Court of Montana, together with the dissenting opinion of Mr. Justice Cheadle.

(Note: The foregoing are included in the Statement as to Jurisdiction as Appendix A, and you are requested to include such opinions in the Transcript at such point.)

3. Petition for Rehearing.

(Note: This petition is included in the Statement as to Jurisdiction as Appendix B, and you are requested to include such petition in the Transcript at such point.)

4. Order Denying Petition for Rehearing.

5. Certified copy of Judgment of trial court under mandate from Supreme Court of Montana, as filed in the said Supreme Court.

6. Petition for Appeal, and, therewith, Assignment of Errors.

7. Statement as to Jurisdiction.

8. Order Allowing Appeal and fixing Bond.

9. Bond on Appeal.

10. Citation.

11. Statement directing attention to Rule 12 of the Rules of the Supreme Court of the United States.

12. Statement by Appellees—Objection and Motion to Dismiss.

Done and dated this 16th day of December, 1946.

Emmett S. Huggins, Edmond G. Toomey, Attorneys
for Appellant.

[fol. 306] ACKNOWLEDGMENT OF SERVICE OF TRANSCRIPT OF
RECORD ON APPEAL

Service of Transcript of Record on Appeal, as certified by Clerk of the Supreme Court of the State of Montana, and receipt of a true copy thereof, is hereby admitted this 5th day of February, 1947.

R. V. Bottomly, ESB, Attorney General of the State of Montana; Clarence Hanley, ESB, Assistant Attorney General of the State of Montana; Edwin S. Booth, Counsel, Board of Railroad Commissioners of the State of Montana.

[fol. 307] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD
TO BE PRINTED—Filed February 10, 1947

Comes now the Appellant, and adopts its Assignment of Errors as its Statement of the Points to be Relied Upon, and represents that the whole of the record as filed is necessary for the consideration of the case.

Dated February 5th, 1947.

Emmett S. Huggins, Indianapolis, Indiana; Edmond G. Toomey, Helena, Montana, Attorneys for Appellant.

Service of the foregoing Statement of Points and Designation of Parts of Record to be Printed, and receipt in hand of a true copy thereof, is hereby admitted this 5th day of February, 1947.

R. V. Bottomly, ESB, Attorney General of Montana; Clarence Hanley, ESB, Assistant Attorney General of Montana; Edwin S. Booth, Counsel, Board of Railroad Commissioners of Montana, Attorneys for Appellees.

[fols. 307a] [File endorsement omitted.]

[fol. 308] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1946

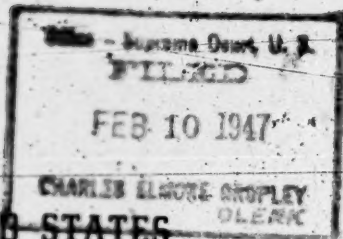
No. 1003

ORDER NOTING PROBABLE JURISDICTION—March 10, 1947

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

— Endorsed on Cover: Enter Edmond G. Toomey. File No. 51,867. Montana, Supreme Court. Term No. 1003. Aero Mayflower Transit Company, Appellant, vs. Board of Railroad Commissioners of the State of Montana, et al. Filed February 10, 1947. Term No. 1003, O. T. 1946.

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1003 39

AERO MAYFLOWER TRANSIT COMPANY,
Appellant,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF MONTANA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

STATEMENT AS TO JURISDICTION

EDMOND G. TOOMEY,
EMMETT S. HUGGINS,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 8646

AERO MAYFLOWER TRANSIT COMPANY,

A CORPORATION,

Defendant and Appellant,

vs.

**BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF MONTANA, PAUL T. SMITH, LEONARD
C. YOUNG AND HORACE F. CASEY, AS MEMBERS OF
AND CONSTITUTING SAID BOARD OF RAILROAD COMMISSIONERS
OF THE STATE OF MONTANA,**

Plaintiffs and Appellees

STATEMENT AS TO JURISDICTION UNDER RULE 12

The defendant-appellant, Aero Mayflower Transit Company, a corporation, this day concurrently presenting its petition for appeal, pursuant to Rule 12 of the Rules of the Supreme Court of the United States, now presents this, its statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on this appeal to review the final judgment and decree

of the Supreme Court of Montana, dated September 19, 1946, and should exercise such jurisdiction in this case.

A

The Statutory Provision Believed to Sustain the Jurisdiction

This appeal is prosecuted from a final judgment and decree of the Supreme Court of the State of Montana, which restrains and enjoins the defendant, Aero Mayflower Transit Company, from operating in interstate commerce over the public highways of the State of Montana, until it pays to the Board of Railroad Commissioners of the State of Montana, for the years 1937, 1938 and 1939, two (2) kinds of taxes imposed upon its interstate operations by virtue of two (2) different statutes enacted by the legislative assembly of the State of Montana, viz.,

(1) a "flat" or "straight" \$10.00 per annum tax on each vehicle operated over the public highways of the State of Montana, imposed by sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935, originally enacted as sections 16, 17 and 18 of Chapter 184, Laws of Montana, 1931, and, also,

(2) a quarterly tax or fee of one-half of one percent of the gross operating revenue of the carrier with a minimum annual fee of \$15.00 for each vehicle registered and/or operated under the Motor Carrier Act, imposed by sections 3847.27 and 3847.28, Revised Codes of Montana, 1935, originally enacted as sections 2 and 3 of Chapter 100, Laws of Montana, 1935, each of said taxes being laid, in the words of such statutes, "in addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state."

The appeal is on the general grounds, particularized in the Assignment of Errors filed by appellant, that these

statutes and the judgment and decree of the said Supreme Court of the State of Montana, deprive the appellant of property without due process of law, deny it the equal protection of the law, and violate the Commerce clause, in contravention of the Constitution of the United States, and that their enforcement should not be permitted.

The final judgment and decree of the Supreme Court of the State of Montana was entered in that Court at Helena, Montana, on September 19, 1946, after petition by appellant for rehearing filed therein July 8, 1946 (and answer thereto by the respondent Board of Railroad Commissioners of Montana filed therein July 15, 1946), was entertained and reviewed by the Supreme Court of Montana until September 19, 1946, when the petition for rehearing was, by order of the said Supreme Court, dated September 19, 1946, denied. Prior to such denial, Mr. Justice Cheadle, Associate Justice of the Supreme Court of Montana, filed his dissenting opinion on September 19, 1946.

Jurisdiction of this appeal is sustained by Section 237 (a) of the Judicial Code of the United States, also cited as Section 344 (a) of Title 28 of the United States Code, annotated.

B

The Statutes of the State the Validity of Which Are Involved

Two separate groups of statutory enactments are involved, the first enacted in 1931 and the second enacted in 1935. They are:

(1) The "flat" or "straight" \$10.00 Per Vehicle Tax.

The statutes imposing this tax were enacted as Sections 16, 17 and 18 of Chapter 184, Laws of Montana 1931, codified as Sections 3847.16, 3847.17 and 3847.18 of the Revised

Codes of Montana, 1935, found in Volume 2, Revised Codes of Montana, 1935, at pages 688 and 689, as follows:

"3847.16. (a) In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of the public highways of this state, every motor carrier, as defined in this act, shall, at the time of the issuance of a certificate and annually thereafter, on or between the first day of July and the fifteenth day of July, of each calendar year, pay to the board of railroad commissioners of the state of Montana the sum of ten dollars (\$10.00), for every motor vehicle operated by the carrier over or upon the public highways of this state.

"Provided, that a motor carrier engaged in seasonal operations only, where its said operations do not extend continuously over a period of not to exceed six (6) months in any calendar year, shall only be required to pay compensation and fees in a sum equal to one-half ($\frac{1}{2}$) of the compensation and fees herein provided, and, provided further, that the compensation and fees herein imposed shall not apply to motor vehicles maintained and used by a motor carrier as standby or emergency equipment. The board shall have the power and it is hereby made its duty to determine what motor vehicles shall be classed as standby or emergency equipment.

"(b) When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner

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as herein required of motor carriers operating wholly within this state.

“(c) Upon the failure of any motor carrier to pay such compensation, when due, the board may in its discretion revoke the carrier's certificate or privilege and no carrier whose certificate or privilege is so revoked shall again be authorized to conduct such business until such compensation shall be paid.

“(d) All compensation, fees, or charges, imposed and accruing under the provisions of this Act, shall be a lien upon all property of the motor carrier used in its operations under this act; said lien shall attach at the time the compensation, fees, or charges become due and payable, and shall have the effect of an execution duly levied on such property of the motor carrier and shall so remain until said compensation, fees, or charges are paid or the property sold for the payment thereof.

“3847.17. All of the fees and compensation charges collected by the board under the provisions of this act shall be transmitted to the state treasurer who shall place the same to the credit of a special fund designated as “motor carrier fund”; such fund shall be available for the purpose of defraying the expenses of administration of this act and the regulation of the businesses herein described, and shall be accumulative from year to year. All expenses of whatsoever kind or nature of the board incurred in carrying out the provisions of this act shall be audited by the state board of examiners and paid out of the “motor carrier fund.” Such fund shall not come within the restriction of any law of this state governing payment of expense incurred in a previous year, it being intended that such fund

shall be applied to the payment of any necessary costs or expenses in carrying out the provisions of this act, whether incurred during the ensuing year or previous fiscal years, and such "motor carrier fund" or accumulations thereof, are hereby appropriated for the payment of the costs and expenses rendered necessary in the carrying out of the provisions of this act.

"3847.18. All records, books, accounts and files of every class A and class B motor carrier in this state, so far as the same shall relate to the business of transportation conducted by such motor carrier, shall at all times be subject to examination by the board or by any authorized agent or employee of the board. The board shall prescribe a uniform system of accounts and uniform reports covering the operations of such class A and class B motor carriers and every motor carrier authorized to operate as such in accordance with the provisions of this act shall keep its records, books and accounts according to such uniform system, insofar as possible. On or before the fifteenth day of July of each year, every motor carrier authorized to engage in such business shall file with the board a report, under oath. In addition to such annual reports every motor carrier shall prepare and file with the board, at the time or times and in the form to be prescribed by the board, annual reports, special reports and statements giving to the board such information as it shall require in order to perform its duties under this act."

(2) The Quarterly Gross Revenue Tax of One-Half of One Per Cent on the Gross Revenues of the Carrier.

The statutes imposing this tax were originally enacted as Sections 2 and 3 of Chapter 100, Laws of Montana, 1935, codified as Sections 3847.27 and 3847.28 of the Revised

Codes of Montana, 1935, found in Volume 2, Revised Codes of Montana, 1935, at pages 691 and 692, as follows:

“3847.27. In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall between the first and fifteenth days of January, April, July and October of each year, file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one per cent of the amount of such gross operating revenue; provided, however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars (\$30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars (\$15.00).

“3847.28. All fees collected from motor carriers shall be, by the commission, paid into the state treasury and shall be, by the state treasurer, placed to the credit of the motor carrier fund. All other fees and charges collected by the commission under the provisions of this act shall be by the commission paid into the state treasury and shall be by the state treasurer placed to the credit of a fund to be known as the ‘public service commission fund,’ and the general and contingent expenses of the public service commission shall be by the state treasurer paid out of said public service commission fund upon presentation of duly verified claims therefor, which claims shall have been ap-

proved by the commission and audited by the state board of examiners."

The trial court held that the "flat" or "straight" per vehicle tax was valid but that the gross revenue tax was invalid (R. 124-125; Judgment, 127-128).

The Supreme Court of Montana held that both groups of statutes and both taxes were constitutional (Appendix A, p. 22; R. 242 annexed hereto) and enjoined appellant from operating in interstate commerce until such taxes were paid (Appendix A hereto and R. 157).

G

The Date of the Judgment and Decree Sought to Be Reviewed and the Date upon Which the Application for Appeal Is Presented.

The final order, judgment or decree here sought to be reviewed was entered and spread of record in the Supreme Court of the State of Montana on September 19, 1946 (R. 157).

The petition for appeal herein was filed and was presented on December 16th, 1946 (R. 182) and allowed December 16th, 1946 (R. 266).

The Supreme Court of the State of Montana is the highest court in Montana in which a decision in the suit could be had.

Sections 1, 2 and 3, Constitution of Montana, 1 Revised Codes of Montana, 1935, pages 139, 140 and 141.

State ex rel. City of Helena v. Helena W. W. Co., 43 Mont. 169, 115 Pac. 200.

Opinion of the Supreme Court of Montana, written by Mr. Justice Morris and subscribed by three others of the

five members of the court, was rendered and filed on June 29, 1946. Mr. Justice Cheadle reserved his opinion at that time, and subsequently on September 19, 1946, filed his dissenting opinion. (Appendix A hereto, pp. 2-28; R. 221-248).

On July 8, 1946, defendant-appellant, Aero Mayflower Transit Company, filed in the Supreme Court of Montana its petition for rehearing within the time prescribed by the rules of that court (Rule XV, pp. XXX and XXXI, Volume 111, Montana Reports). (Appendix B hereto, pp. 1-17; R. 249-265.)

On July 15, 1946, the Board of Railroad Commissioners of the State of Montana filed their answer to petition for rehearing in the Supreme Court of Montana () and such petition and answer were entertained and reviewed by the Supreme Court of Montana until September 19, 1946, when it was denied (R. 157), after which remittitur was issued to the trial court and its judgment on mandate of the Supreme Court entered October 28, 1946 (R. 177).

The adjudication by the Supreme Court of Montana was final in its nature on September 19, 1946, because if there should be an affirmance by the Supreme Court of the United States the District Court of Silver Bow County, Montana, would have nothing to do but to execute the judgment it had already entered (R. 177). And see R. 295.

D

Statement Showing That the Nature of the Case and of the Rulings of the Court Was Such as to Bring the Case Within the Jurisdictional Provisions Relied upon.

It is admitted of record that Aero Mayflower Transit Company, a corporation, appellant, operates exclusively in interstate commerce, and hence no question of the power of the State of Montana to control, regulate or tax its intra-

state commerce is involved. By its answer (R. 64) to section A of defendant's (appellant's) cross-complaint (R. 10 and 11) the Board admits:

"The carrier is, and has been since September, 1928, a corporation organized and existing under and pursuant to the laws of the State of Kentucky, with its principal office in the City of Indianapolis, State of Indiana; that it owns and operates a fleet of motor trucks, inclusive of the trucks occasionally within the State of Montana as hereinafter referred to, all of which are licensed under the laws of the State of Indiana, and carry at all times license plates of the State of Indiana; that its business is that of transporting by motor vehicle, in interstate commerce only, over the highways of the United States used household goods and office furniture, incident only to the change of residence of the owner of such goods, under a separate order for such transportation and given in each instance by or on behalf of the owner of said goods, at the rate for such transportation set out in its schedule of rates on file with the Interstate Commerce Commission, of the United States. That each shipment is transported under a separate contract therefor, and may be from any point in the United States to any other point in the United States, so long as the point of destination is in a state other than the state within which the shipment originates. That the carrier does not operate its motor trucks, or any of them, on any fixed schedule, or over any regular routes. Shipments of furniture from without the state are transported to and delivered to points within the state, or shipments of furniture originating within the state are transported to points without the state, or shipments of furniture in transit are transported through the state, or motor trucks without load are driven through the state. That carrier never had done and does not now do or carry on and has no intention of

carrying on hereafter any intrastate business in the State of Montana and that its operations with respect to the State of Montana have at all times been interstate operations into, out of, across or through said State. That it has been granted, and now operates under, Permit No. 2934 issued to it by said Interstate Commerce Commission, under and pursuant to the provisions of the Federal Motor Carrier Act of 1935, as a common carrier."

The Supreme Court of Montana in its opinion stated with respect to the nature of appellant's operations:

"There is no dispute as to the facts. * * * It (the Company) does not transport goods of any nature or kind from one point to another in the same state. The only transportation it engages in so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state."

(Opinion of Supreme Court of Montana, Appendix A, Par. 3, at pp. 2 and 3; R. p. 222 and 223.)

On October 3, 1935, the Board of Railroad Commissioners of Montana (hereinafter referred to as "the Board") issued to appellant a "permit" numbered 1354, granting appellant the right to transport property as a common carrier in interstate commerce over the public highways of Montana (R. 15 and 64). On September 19, 1939, the Board issued an order to show cause why the permit should not be cancelled, alleging that the carrier (appellant) refused to pay the taxes and fees referred to (R. 16), and after answer and return by the appellant to such order, in which answer appellant attacked the constitutionality of the taxes and fees under the United States Constitution, and the State Constitution as well (R. 47-59), the Board, after a hearing, by its order of October 9, 1939, assumed to cancel the "permit" to operate in interstate commerce because

of the non-payment of the taxes and fees in question (R. 61-62). On October 13, 1939, the Board followed its administrative action by filing in the District Court of the Second Judicial District of the State of Montana, in and for Silver Bow County, at Butte, a suit in equity, to restrain appellant from operating in interstate commerce, until it paid the taxes and fees for which the Board made claim (R. 1-6). Appellant, as defendant in the suit, defended on the merits (R. 7-123) and after trial, the District Court of Silver Bow County by Findings of Fact and Conclusions of Law (R. 124-126) and Amended Judgment (R. 127-128).

(a) *upheld* the validity of the "flat" or "straight" per vehicle tax imposed by sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935, and restrained appellant from operating in interstate commerce until such taxes were paid for the years 1937, 1938 and 1939 (R. 124-126; 127-128), but, on the other hand,

(b) *denounced* the gross revenue tax as imposed by sections 3847.27 and 3847.28, Revised Codes Montana, 1935, as invalid, and enjoined the Board from enforcing or applying such taxes against appellant (R. 124-126; 127-128).

Aero (appellant here) appealed to the Supreme Court of Montana from that part of the judgment adverse to it, i.e., upholding the validity of the "flat" or "straight" \$10.00 per vehicle tax, and the Board appealed to the Supreme Court of Montana from that part of the District Court judgment adverse to it, i.e., holding the gross revenue tax unconstitutional and void (Opinion, Appendix A. Par. 7, pp. 4 and 5; R. 224-225). Each appellant specified errors in the rulings of the lower court adverse to it (R. 128-c and 128-e.)

The Supreme Court of Montana found that the gross revenue tax was valid, and, accordingly, *reversed* the judg-

ment of the District Court of Silver Bow County as to that tax; the Supreme Court *affirmed* the trial court's conclusion that the "flat" or "straight" per vehicle tax was valid. Thus, the applicability and the constitutionality of both taxes to appellant's interstate operations was affirmed by the highest court of the State of Montana (Opinion, Appendix A and R. 157).

There was drawn in question in all stages of this suit the validity of both kinds of taxes, i.e., as imposed by both groups of statutes, on the ground that each tax as applied to appellant's exclusive interstate operations is repugnant to the Constitution of the United States. The Federal questions were repeatedly raised from the appearance of appellant in the basic administrative proceedings through appellant's petition for rehearing in the Supreme Court of Montana, as follows:

(a) In the Return To Order To Show Cause, made by appellant in Docket No. 3075, "In the Matter of Fees Claimed From Aero Mayflower Transit Company," before the Board of Railroad Commissioners of Montana, citing the cases in the Supreme Court of the United States believed to establish the invalidity of the statutes imposing both taxes, on the contention of appellant that the taxes constituted an attempt by the state to exact taxes for the privilege of carrying on interstate commerce only, without any method in the statute by which the taxes, and each of them, were related to, or measured by appellant's use of the highways of Montana, or its earnings, solely in interstate commerce, apportioned to or allocated to Montana (R. 48-59).

(b) In the Answer and Cross-complaint of appellant in the action commenced by the Board in the District Court of Silver Bow County, Montana, where the constitutionality of the "flat" or "straight" fee of \$10.00 per vehicle was challenged as contravening the equal protection clause of the Fourteenth Amendment to

the Federal Constitution (Sec. H of Cross-complaint, R. 31 and 32) and as contravening clause 3 of Section 8 of Article I of the Federal Constitution and the due process of law clause of the Fourteenth Amendment, on the grounds that the tax is an attempt by the State to lay a tax on the privilege of engaging in interstate commerce, is not apportioned on any basis whatever to that commerce, bears no relation to the use of the highways, and is indiscriminately applied to interstate and intrastate commerce (Sec. H and Sec. I of Cross-complaint, R. 33-38);

and where the constitutionality of the gross revenue tax was challenged as contravening clause 3, Section 8, Article I. of the Constitution of the United States, and the due process clause of the Fourteenth Amendment, and, also, the equal protection clause of the Fourteenth Amendment, because the tax was collected to apply on cost of regulating public utilities such as electric power plants, telephones, street railways, steam heating, etc., and not related to the use of the highways at all, because appellant had no revenues except revenues from interstate commerce and the tax was laid by the State as a direct burden upon the Federal privilege of engaging in that commerce, because there was no attempt to segregate a base of interstate revenues for taxation in Montana if such is permissible as compensation for the use of the highways, and because there was no method, formula, or standard specified by the statute or suggested in the statute for apportioning any revenues for taxation, if interstate revenues may be apportioned to the State of Montana for taxation (Secs. K and L, of Cross-complaint, R. 39-44).

(c) In the Motion to Strike filed by appellant against the Reply and Answer of the Board to appellant's Answer and Cross-complaint (R. 70 and 71 (motion) and R. 68. (Reply of Board)) on the ground the gross revenue tax statute was to be construed on the basis of its mandates and not on any gratuitous amelioration of the statute by the Board, absent legislative authority to it.

(d) In Objection by appellant to evidence proffered on the cross-examination of appellant by Board, at trial as follows (R. 83 and 84):

"Q. Now, so far as the year 1939 is concerned, did the Board of Railroad Commissioners of the state of Montana ever demand of your company payment of any fees based on $\frac{1}{2}$ of 1% for the total gross revenue of all of your revenue throughout all states?

"A. Throughout all states?

"Q. Yes.

"A. Not to my knowledge.

"Q. Has it ever made any demand of your company for payment of $\frac{1}{2}$ of 1% on the gross revenue of the entire gross revenue of the company?

"Mr. Toomey: To which objection is made on the ground and for the reason that the statute in question provides that the Board shall collect $\frac{1}{2}$ of 1% of the gross revenue from the carrier, subject to a minimum of \$15.00 per vehicle and that there is no language in the statute and no suggestion in the statute that the tax shall be applicable to any revenues that arise from any part of interstate operations in Montana. And upon the further grounds that under the law, the statute is to be tested not by what the Board actually does under it in administration, but what may be done under the statute.

"The Court: The objection is overruled.

"A. No, not to my knowledge.

By Mr. Matson:

"Q. As a matter of fact, the demand of the Board of Railroad Commissioners, prior to the bringing of this action, was for the minimum under the gross revenue, was it not, the minimum of \$15.00 per vehicle?

"A. It was for the minimum of \$15.00 per vehicle for, I presume, the percentage of our Montana revenue. I don't know that they computed the percentage, and on account of the rather limited operation in the state, I presume they thought they might collect the minimum." (R. 83 and 84).

(e) In the Request of the Board for Findings of Fact and Conclusions of law that both taxes were valid (R. 93-95).

(f) In the detailed Request of appellant for Findings of Fact and Conclusions of law (R. 96-126, in particular, at R. 97, 98, 115, 116, 117, 118, 119, 120, 121, 122) where the asserted grounds of invalidity under the Federal Constitution were again repeated, as in (a), (b), (c) and (d) above, and amplified.

(g) In the Findings of Fact and Conclusions of Law actually entered by the trial court, i.e., that the "flat" or "straight" *\$10.00 per vehicle tax was a valid exercise of legislative authority, and the quarterly gross revenue tax was invalid* because "it fails to specify any method by which the gross operating revenue of the defendant in the State of Montana for any year may be determined" (R. 124-126, in particular Pars. 1, 2 and 3 of Conclusions of Law at pp. 125-126).

(h) In the Assignment of Errors by appellant in its brief on appeal in the Supreme Court of Montana (R. 128-c and 128-d), and,

(i) Finally, in the opinion of a majority of the Supreme Court of Montana, where the constitutional questions were stated and attempted to be examined and attempted to be decided (Appendix A, hereto), albeit that the Supreme Court of Montana said of the quarterly gross revenue tax,

"Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention with which we do not

agree, no difficulty would arise in putting into effect the minimum fee of \$15.00 required for each company vehicle operated in the State." (Emphasis ours) Appendix A, p. 18; (R. 238.)

(j) In the opinion of the Supreme Court of Montana, the validity of both taxes, as against the challenges of invalidity under the Commerce Clause (Clause 3, Sec. 8, Article I and the equal protection of the law clause and the due process clause of the Fourteenth Amendment, Constitution of the United States) was affirmed (Appendix A, hereto).

E

Statement of the Grounds upon Which It Is Contended That the Questions Involved Are Substantial

Two basic questions are presented to the Supreme Court of the United States on this appeal:

First, Is it within the power of the State of Montana under the Commerce Clause and under the Fourteenth Amendment to the Constitution of the United States, to enjoin and prohibit Aero Mayflower Transit Company, a Kentucky corporation, from engaging exclusively in interstate commerce as a contract carrier by motor vehicle on and over the highways of Montana, because the carrier refuses to pay to the Board of Railroad Commissioners of Montana a quarterly tax of one-half of one per cent upon its gross operating revenues as a carrier, where the state statute imposing the tax as alleged compensation for use of the highways of Montana,

(a) levies the tax upon all the gross operating revenues of the carrier, from whatever source derived,

(b) levies the tax necessarily on interstate revenues of the carrier since it has no revenues except revenues

from interstate commerce, and where the statute construed by the Supreme Court of Montana to apply to "the gross revenue derived from operations in Montana . . . and not the company's gross revenue from all sources" contains no method, standard, formula or measure for ascertaining "gross revenue from operations in Montana," and delegates no authority to any agency of the state to make such determination within any limits, and

(c) levies the gross tax without attempt to relate it in any manner to use of the highways.

Second. Is it within the power of the State of Montana under the Commerce Clause and under the Fourteenth Amendment to the Constitution of the United States, to enjoin and prohibit Aero Mayflower Transit Company, a Kentucky corporation, from engaging exclusively in interstate commerce as a contract carrier by motor vehicle on and over the highways of Montana, because the carrier refuses to pay to the Board of Railroad Commissioners of Montana an annual tax of \$10.00 for every motor vehicle operated by the carrier over the highways of Montana, as alleged compensation for use of the highways of Montana, where tax levy revenues

(a) are not "expended" as erroneously stated by the Supreme Court of Montana, "to build, maintain, and supervise highways," but are by the terms of the statute sent to a motor carrier fund where they become available "for the purpose of defraying the expenses of administration of the motor carrier Act, and the regulation of the business of motor carriers described in the Act.

(b) Where the tax is necessarily levied on vehicles in interstate commerce only since the carrier operates no vehicles over the highways of Montana except in interstate commerce.

(c) Where the tax is levied as a condition of the carrier operating exclusively in interstate commerce, at the will of the State, and without reference to the right of the carrier so to operate under the provisions of the Federal Motor Carrier Act.

(d) Where the tax on its face bears no relation to the actual use of the roads and is not used for highway purposes at all.

It is contended that *both* of these basic questions are *substantial*, are highly debatable, and, moreover, are of such a character as to affect interstate motor carriers, common and contract, not only in Montana, but throughout the entire United States, indeed to concern the United States.

It is further contended that these questions have not been decided by the Supreme Court of the United States and that they are not foreclosed by principles enunciated in existing decisions dealing with the right of the State to impose even upon motor vehicles engaged exclusively in interstate commerce a charge as compensation for use of the highways.

The Montana statutes are unique; they are arbitrary. They evince definite hostility to interstate commerce, and they are so artlessly drawn that their pious, self-serving declarations of compensation for use of the highways do not disguise their plain intent to invade the forbidden field of taxing gross revenues from interstate commerce as such, and that is their manifest and inescapable effect.

Nor is this the first time that the State of Montana has evinced a manifest carelessness, if not hostility, in dealing with the subject of interstate commerce. In 1935, the Supreme Court of the United States unanimously condemned a Montana statute imposing an occupation tax on all telephones of an interstate telephone company where the statute

was without regard for the distinction between interstate and intrastate business.

Cooney v. Mountain States T. & T. Co., 294 U. S. 384, 79 L. Ed. 934; see pp. 941-942.

The foregoing opinion ~~was not noticed~~ by the Supreme Court of Montana in the opinion in this case, nor did it notice its own earlier opinion recognizing the force of the opinion by the United States Supreme Court in the *Cooney* case, i.e., *State v. Montana-Dakota Utilities Co.*, 114 Mont. 161, 133 Pac. (2d) 534.

THE FACTS

There is no essential dispute as to the facts. The Supreme Court of Montana said, "There is no dispute as to the facts." (Appendix A, p. 2; R. p. 222). The Supreme Court also found (as noted on pages 10-11 of this Statement of Jurisdiction, above) that appellant used Montana highways only in interstate movements. (Opinion of that Court, Par. 3, Appendix A, page 2; R. 222.)

Appellant set up in its cross-complaint (Sec. E, R. 20, 21, 22, 23, 24 and 25) that it paid the "other taxes" exacted by the State of Montana in 1937, 1938 and 1939, i.e., (a) the Motor Vehicle-Registration and License Plate Taxes (Sections 1760-1760.10, Revised Codes of Montana, 1935) and (b) the 5¢ per gallon gasoling tax out of which the public highways of Montana are constructed; with aid from the United States of America (Sections 2381.1-2396.9, Revised Codes of Montana, 1935; and Initiative Measure No. 41, known as "The State Highway Treasury Anticipation Debentures Act of 1939" (Laws of 26th Session, Montana Legislative Assembly, at page 743, as amended by Chapter 30, Laws of 1939, at page 40, same volume) and it proved such facts at the trial (R. 76-80). Appellant also exposed

its use of Montana highways in 1937, 1938 and 1939, by Section D of its cross-complaint (R. 18-20) and proved such use on trial (R. 82). Hence, there is no obscurity in the facts, and the questions stated remain for final answer on this appeal, as applied to one who operates exclusively in interstate commerce who has no revenues from any source except interstate commerce, and which revenues the State assumes to tax under compulsion of stopping and prohibiting such a one from carrying on interstate commerce, if such taxes are not paid.

Appellant asserts that the Supreme Court of the United States has never decided that a state may tax gross revenues from interstate commerce as a condition of the state permitting that commerce to be carried on over its highways, whatever the purpose, and that is what is done by the statute imposing the gross revenue tax in question.

Appellant further asserts that there is utterly no foundation in the language of the statute imposing the gross revenue tax for the Supreme Court of Montana concluding that the tax applies to "gross revenue derived from operations in Montana," whatever those words may mean, and that, in any event, the legislature has wholly failed to provide (nor did the court invent or supply) any standard, method, formula or principle for ascertaining "gross revenue derived from operations in Montana."

The result is that the statute is a naked, arbitrary command to "pay a tax on gross revenue or keep off the highways of Montana," uttered by an administrative board from whom the legislature has withheld any means of ascertaining or computing the tax, to provide a method of ascertainment. The Board is reduced to the position where it must say, "Pay us a tax of $\frac{1}{2}$ of 1% on gross revenues derived from operations in Montana, on some basis we invent, or do not engage in interstate commerce over the highways of Montana."

Appellant respectfully suggests that if that power is sustained then the great constitutional purpose of the Commerce Clause is brought to naught, and brought to naught by a power which knows no bounds. The Supreme Court of Montana sought to salvage the gross revenue tax, but it could not itself invent an apportionment device, so it concluded, in effect, "Well, anyhow the \$15.00 minimum is ascertainable." That minimum, however, has no existence apart from the invalid gross revenue measure.

That a substantial Federal question is presented is demonstrated by these cases:

McCullough v. Maryland, 4 Law Ed. 579; 4 Wheaton 316;

Gibbson v. Ogden, 6 Law Ed. 23, 9 Wheaton 1;

Smith v. Turner and Norris v. City of Boston, 12 Law Ed. 702, 7 Howard 783;

Cook v. Pennsylvania, 97 U. S. 566, 24 Law Ed. 1015;

Fargo v. Michigan (*Fargo v. Stevens*) 121 U. S. 230, 30 L. Ed. 888, 7 S. Ct. 857, 1 Inters. Com. Rep. 51;

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. Ed. 1200, 7 St. Ct. 1118, 1 Inters. Com. Rep. 308;

Leloup v. Mobile, 127 U. S. 640, 32 L. Ed. 311, 8 Sup. Ct. 1380;

Galveston H. & S.A.R. Co. v. Texas, 210 U. S. 217, 52 L. Ed. 1031, 28 S. Ct. 638;

Meyer v. Wells, F. & Co., 223 U. S. 298, 56 L. Ed. 445, 32 S. Ct. 218;

Williams v. Talladega, 226 U. S. 404, 419, 57 L. Ed. 275, 33 Sup. Ct. 116;

Minnesota Rate Cases (*Simpson v. Shepard*), 230 U. S. 352, 400, 57 L. Ed. 1511, 1541, 33 Sup. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18;

Crew, Lerick Co. v. Pennsylvania, 245 U. S. 292, 62 L. Ed. 295, 38 Sup. Ct. 126;

United States Glue Co. v. Oak Creek, 247 U. S. 321, 328, 62 L. Ed. 1135, 1141, 38 Sup. Ct. 499, Ann. Cas. 1918E, 748;

Sprout v. South Bend, 277 U. S. 163, 171, 72 Law Ed. 833, 48 Sup. Ct. 562;

New Jersey Bell Tel. Co. v. State Bd. of Taxes & Assessments, 280 U. S. 338, 349, 74 L. Ed. 463, 469, 50 Sup. Ct. 411;

East Ohio Gas v. Tax Commission, 283 U. S. 465, 75 Law Ed. 1171, 51 Sup. Ct. 499;

Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 655, 80 Law Ed. 956, 959, 56 Sup. Ct. 608;

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90, ante, 64, 58 Sup. Ct. 72;

Western Live Stock v. Bureau of Revenue, No. 322, October Term, 1937 (303 U. S. 250, ante, 828, 58 Sup. Ct. 546, 115 A. L. R. 944);

Adams Mfg. Co. v. Storen, 304 U. S. 307, 82 Law Ed. 1365;

Gwin, White & Prince v. Hanneford, 305 U. S. 434, 83 Law Ed. 272;

Best & Company v. Maxwell, 311 U. S. 454, 85 Law Ed. 274;

Nippert v. Richmond, 90 U. S. S. C., Advance Opinions 9.

In the following cases, the doctrine that the State may not exact a "flat" or "straight" fee, not devoted to highway use, and not related to cost of supervision of an exclusive interstate carrier is applied or recognized:

Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199;

Interstate Busses Corp. v. Blodgett, 276 U. S. 551;

Carley & Hamilton v. Snook, 281 U. S. 66, 74 L. Ed. 704, 708;

Interstate Transit Inc. v. Lindsey, 283 U. S. 183, 75 L. Ed. 953;

In *Aero Mayflower Transit Co. v. Ga. Pub. Comm.*, 295 U. S. 286, 79 L. Ed. 1439 while a flat tax of \$25.00 a year per truck was held valid, *the money actually went into a fund for upkeep of highways*; no gross revenue tax was involved.

Ingels v. Morf, 300 U. S. 290, 81 L. Ed. 653;

Dixie Ohio Express Co. v. State Revenue Commission, 306 U. S. 72, 83 L. Ed. 495;

McCarroll v. Dixie Greyhound Lines, Inc., 309 U. S. 176, 84 L. Ed. 683.

And see the discussion by Lockhard in "Gross Receipts on Interstate Transportation and Communications" in 57 Harvard Law Review 40.

If treated as an inspection fee, the Montana gross revenue tax ~~is invalid~~ because the state did not assume to discharge the burden upon it of showing the sums collected from the carrier for the common pot of the public service commission did not exceed what is reasonably needed for inspection and supervision service accorded appellant.

Foot & Co. v. Stanley, 232 U. S. 494, 58 L. Ed. 698, 34 Sup. Ct. 377.

Great Northern Ry. Co. v. Washington, 300 U. S. 154, 81 Law Ed. 573, 57 Sup. Ct. 397 (in this case the Washington statute reviewed, enacted in 1929 is so similar to the Montana statute as to suggest that it may well have been its progenitor.)

Taxes laid on interstate commerce without apportionment, or where inadequately apportioned are uniformly held invalid:

Norfolk & Western R. Co. v. Pennsylvania, 136 U. S. 114; 34 Law Ed. 394; 10 Sup. Ct. 958;

Allen v. Pullman's Car Co., 191 U. S. 171; 48 Law Ed. 134, 24 Sup. Ct. 39;

Fargo v. Hart, 193 U. S. 490; 48 Law Ed. 761, 24 Sup. Ct. 498;

Union Transit Co. v. Kentucky, 199 U. S. 194; 50 Law Ed. 150, 26 Sup. Ct. 36;

Union Tank Line Co. v. Wright, 249 U. S. 275; 63 Law Ed. 602, 39 Sup. Ct. 276;

Wallace v. Hines, 253 U. S. 66; 64 Law Ed. 782, 40 Sup. Ct. 435;

Southern Ry. Co. v. Kentucky, 274 U. S. 76; 71 Law Ed. 394, 47 Sup. Ct. 542;

Johnson Oil Co. v. Oklahoma, 290 U. S. 158, 78 Law Ed. 238, 54 Sup. Ct. 152.

And see, particularly, *Freeman, Trustee v. Hewit*, Director of Gross Income, etc., decided this December 16th, 1946, and cases there cited. — U. S. —, No. 3, October Term, 1946.

The following decisions of the Supreme Court of the United States are believed to sustain the jurisdiction of that Court on a direct appeal to review the final order, judgment or decree here in question:

Bush Co. v. Maloy, 267 U. S. 317, 69 Law Ed. 627; 45 Sup. Ct. 326;

Sprout v. South Bend, 277 U. S. 163, 72 Law Ed. 833, 48 Sup. Ct. 502;

Interstate Transit v. Lindsey, 283 U. S. 183, 75 Law Ed. 953, 51 Sup. Ct. 380;

Guin, White & Prince v. Henneford, 305 U. S. 434, 8
Law Ed. 272, 59 Sup. Ct. 325;

Butler Bros. v. McColgan, 315 U. S. 501, 86 Law Ed.
991, 62 Sup. Ct. 701.

Respectfully submitted,

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Attorneys for Appellant.

APPENDIX "A"

STATE OF MONTANA, IN THE SUPREME COURT, JUNE TERM, 1946

No. 8646

BOARD OF RAILROAD COMMISSIONERS of the State of Montana,
PAUL T. SMITH, LEONARD C. YOUNG and HORACE F. CASEY,
as members of and constituting the Board of Railroad
Commissioners of the State of Montana, Plaintiffs and
Appellants on Appeal of said Board, and Respondents
on Cross-Appeal of Aero Mayflower Transit Company,
a corporation,

vs.

AERO MAYFLOWER TRANSIT COMPANY, a Corporation, De-
fendant and Respondent on Appeal of said Board, and
Appellants on Cross-Appeal of Aero Mayflower Transit
Company, a corporation.

Submitted: April 13, 1946.

Decided: June 29, 1946.

Filed: June 29, 1946.

Dissent Filed: Sept. 19, 1946. Frank Murray, Clerk.

Mr. Justice Morris delivered the Opinion of the Court.

This controversy involves the question as to what extent a state may impose burdens in the way of licenses and taxes upon motor carriers engaged in interstate commerce for operating their vehicles over the highways of the state. Such exactions are imposed upon the presumption that the state owns the highways within its borders, and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways.

The Board of Railroad Commissioners of the State of Montana, hereinafter referred to as the Board, brought this suit to restrain the Aero Mayflower Transit Company, a Kentucky corporation, hereinafter referred to as the Company, from operating its motor vehicles over the high-

ways of the state until it shall have complied with the provisions of Chapter 310 of the Political Code, known as the Motor Carriers Act, comprising sections 3847.1 to 3847.28 of the Revised Codes, inclusive. A restraining order was issued as prayed for by the Board, and the Company for some months discontinued operations in the state, but later filed a bond with the court and the court made an order permitting the Company to continue operations pending determination of the issues involved.

There is no dispute as to the facts. The Company is engaged in the motor transportation of used or second hand household goods and office furniture from one state to another for hire. It does not transport any goods of any nature or kind from one point to another in the same state. The only transportation it engages in so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state. It alleges that it operates under permit No. 2934 issued to it by the Interstate Commerce Commission. It appears that in October 1935 the Board issued to the Company a "Class C" permit. In September 1939 the Board issued an order directing the Company to show cause why its permit to operate its vehicles over the highways of Montana should not be revoked. A hearing followed on October 6, 1939, and on the succeeding 9th of October the Board issued an order cancelling the permit theretofore issued to the Company on the ground that the Company was using the highways of the state "In an unlawful and unauthorized" manner. The position of the Board appears to be that the Company may not use the highways of the state until it shall have applied to the Board and been granted a permit and paid the taxes and fees imposed by statute.

To the complaint of the Board in the instant action the Company interposed both a special and general demurrer, and such demurrers being overruled, the Company answered by way of general denial followed by cross-complaint. The cross-complaint at great length sets out the various acts of the parties showing the conflicting views of each which gave rise to the issues involved in the action. Briefly stated the Company contends that the Motor Car

riers Act, *supra*, is not applicable to interstate commerce, but governs those engaged in intrastate commerce only; that sections 3847.16 and 3847.17, if applied to it, violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and sections 1 and 11 of Article XII of the Constitution of Montana.

It appears that the state has heretofore and for some years collected two separate exactions from the Company; The Registration License Tax authorized by sections 1760-1760.10, Revised Codes; and the tax on sales of gasoline, authorized by sections 2381.1 to 2396.9, Revised Codes. The further exactions challenged by the Company in this action are (a) the "Ten Dollar per vehicle 'straight' or 'flat' tax," authorized by sections 3847.16 and 3847.17, Revised Codes, and (b) "The tax of one-half of one per cent of the amount of *gross revenue*, from wherever derived by the defendant in the United States, under section 3847.27," which is the construction the Company places upon that section, with a minimum fee of \$15.00 for each vehicle operated by the Company in Montana.

While there is but one set of findings of fact, conclusions of law, and a single judgment, two separate actions were entered on the docket in the lower court, action No. 38175 in which the Board was the complainant, and action No. 38765 in which the Company was the complainant. When the actions came on for hearing the parties stipulated in open Court that the actions might be combined and tried as one, it being agreed that the issues in the two actions were practically the same.

The combined action was tried to the court sitting without a jury. The pleadings by the Company contained practically all the record facts involved in the controversy between the parties relative to the orders made by the Board and sundry hearings had before it. All the evidence adduced at the hearing before the trial court consisted of a brief examination of the counsel and chairman of the Board and the examination of the Vice-President and Manager of the Company. When both parties rested, the matter was submitted on briefs, and both parties later submitted proposed findings of fact and conclusions of law. The court made and entered its own findings of fact and conclusions of

law, and made and entered its amended judgment, it having been found that the judgment first entered did not follow the findings of fact and conclusions of law. By conclusion of law number 2 the court held that section 3847.16, Revised Codes, "is a valid exercise of legislative authority and should be obeyed." By the amended judgment the Company was restrained and enjoined from operating its motor vehicles over the highways of the state of Montana until it shall have paid the amounts due the state as demanded under section 3847.16, Revised Codes, as follows: for the year 1938, \$250.00; for the year 1939, \$400.00; for the year 1940, \$440.00, with interest on the respective amounts from the first day of January of each year mentioned until paid, with costs to the Board. It was "further ordered, adjudged and decreed that said Board be and it is enjoined and restrained from enforcing or applying against defendant any of the provisions of section 3847.27, Revised Codes of Montana, 1935, and in particular from exacting any of the fees and taxes therein specified." Both the Board and the Company appealed from that part of the judgment adverse to it. The effect of the judgment of the trial court is to overrule the Company's contention that section 3847.16 is invalid as in conflict with the commerce clause of the Federal Constitution, and the Constitution of Montana.

The effect of the trial court's order enjoining the Board from enforcing any of the provisions of section 3847.27, Revised Codes, is to relieve the Company from the obligation to comply with the Board's demand to pay the tax of one-half of one percent of its gross revenue or the minimum fee of \$15.00 on each vehicle operated over the roads of the state.

Of the nine specifications of error assigned by the Company, the first is upon the court's overruling its demurrer to the complaint. The Company by its demurrer contends that as the Board is purely a creature of a statute it has no power to sue; that by reason of the provisions of section 3806, Revised Codes, the state is a necessary party to these actions. The Board of Railroad Commissioners is created and its powers enumerated by Chapter 309 of the Political Code, comprising sections numbered 3779 to 3847 inc., Revised Codes, and Chapter 310 as heretofore men-

tioned is the Motor Carriers Act. By section 3847.8 of the latter chapter, the enforcement of the Motor Carriers Act is vested in the Board of Railroad Commissioners. It is true, as contended by the Company, that section 3806 provides actions to enforce the Board's regulations under the law shall be brought by the Attorney General in the name of the state, but section 3847.14 of the Motor Carriers Act provides in part, "Orders and final determinations of the board in all proceedings pursuant to the provisions of this act shall be enforced in the manner provided for the enforcement of orders of the board of railroad commissioners by the provisions of chapter 309 of the political code, and laws amendatory thereof. Provided, further, that if any motor carrier shall operate in violation of the provisions of this act, or shall fail or neglect to obey any lawful order of the board, *the board or any party injured may* apply to any court of competent jurisdiction, in any county where such motor carrier is engaged in business, for the enforcement of this act or such order; and the court shall enforce obedience thereto by writ of injunction, or other proper process, mandatory, or otherwise, and to restrain such carrier, its officers, agents, employees, or representatives from further violation of this act, or such order, or to enjoin upon it, or them, obedience to the same." We think this section must be construed along with section 3806, supra, and being a later enactment controls and modifies section 3806, and that the Board is authorized to maintain this action.

Specifications of error Nos. 2 and 3 are on alleged error of the court in refusing to adopt the findings of fact and conclusions of law proposed by the Company. Such proposed findings and conclusions are predicated upon the contention that as the Company is engaged in interstate transportation only the legislative acts under which the Board assumes to enforce the exactions in the way of fees and taxes are acts which apply exclusively to motor carriers engaged solely in intrastate commerce. In this connection the Company contends that section 3847.16, Revised Codes, is null and void by reason of its conflict with the Fourteenth Amendment to the Constitution of the United States and with section 27 of Article III, the due process.

clause, of the Constitution of Montana, and it is further contended that the fees and licenses which the Board demands the Company shall pay may, under the statute, be used for other purposes than improvement and maintenance of the highways of the state, and that when such exactions in the way of taxes and licenses are imposed upon the Company for other purposes they become in effect exactions on interstate commerce and section 3847.16, Revised Codes, is therefore illegal and void as to the plaintiff, being in violation of Clause three of section 8, Article I of the Constitution, the commerce clause, of the United States.

Mr. Justice Brandeis, speaking for the court, clearly stated the rule applicable to the relative rights and power of the Federal Congress and state legislatures in regard to providing rules and regulations and imposing exactions in the way of fees, licenses and taxes on motor carriers in the case of *Interstate Transit, Incorporated v. Lindsey*, 283 U. S. 183, 75 L. Ed. 953, a case arising under an act of the legislature of the state of Tennessee imposing a tax upon concerns operating interstate motor busses on the highways of the state. The controversy involved "a privilege tax graduated according to carrying capacity." A tax of \$500 a year was imposed upon each vehicle seating more than twenty and less than thirty passengers. The motor company made a quarterly payment under protest and brought suit to recover the amount paid on the ground that the statute applied violated the commerce clause of the Federal Constitution. The trial court allowed recovery, but its judgment was reversed by the Supreme Court of the state and the case was appealed to the Supreme Court of the United States as above indicated. Justice Brandeis said: "While a state may not lay a tax on the privilege of engaging in interstate commerce, *Sprout v. South Bend*, 277 U. S. 163, it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. *Kane v. New Jersey*, 242 U. S. 160, 168-169; *Clark v. Poor*, 274 U. S. 554; *Sprout v. South Bend*, supra, pp. 169-170. As such a charge is a direct burden on interstate commerce, the tax cannot

be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, or by the express allocation of the proceeds of the tax to highway purposes, as in *Clark v. Poor*, *supra*, or otherwise where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. *Hendrick v. Maryland*, 235 U. S. 610, 612; *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 250-252. Compare *Interstate Busses Corp. v. Holyoke Street Ry.*, 273 U. S. 45, 51.

"The conclusion that the tax challenged is laid for the privilege of doing business and not as compensation for the use of the highways is confirmed by contrasting section 4 of the 1927 Act with those statutes which admittedly provide for defraying the cost of constructing and maintaining highways and regulating traffic thereon. The former declares specifically in connection with the privilege tax on interstate busses that the proceeds 'shall go and belong exclusively to the General Funds of the State.' On the other hand, in the legislation by which Tennessee has provided for defraying the cost of constructing and maintaining the state highways and regulating motor traffic, it has been the consistent practice to prescribe that moneys raised for this purpose shall be segregated and go into the Highway Fund. The present system of motor regulations was inaugurated in 1915. At the same session, the legislature created a State Highway Commission with power to construct and maintain highways. In these statutes and in many later ones—prescribing additional fees for the registration and licensing of motor vehicles, imposing gasoline taxes, laying a one mill road tax, and authorizing the issue of bonds for the construction of highways and bridges, the legislature provided that the proceeds of the fees, taxes, and bonds, and of the tolls collected on bridges, should be set apart as state highway and bridge funds to be expended by the Commission exclusively for the construction and

maintenance of highways or bridges. The absence in Section 4 of this provision, which characterizes almost every other Tennessee statute relating to the construction and maintenance of highways or the regulation of motor vehicle traffic, is additional evidence that the present tax was not exacted for such purposes, but merely as a privilege tax on the carrying on of interstate business.

"It is suggested that a tax on busses graduated according to carrying capacity is common and is a reasonable measure of compensation for use of the highways. It is true that such a measure is often applied in taxing motor vehicles engaged in intrastate commerce. Being free to levy occupation taxes, States may tax the privilege of doing an intrastate bus business without regard to whether the charge imposed represents merely a fair compensation for the use of their highways. Compare *Gundling v. Chicago*, 477 U. S. 183, 189. But since a State may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charge must be necessarily predicated upon the use made, or to be made, of the highways of the State. *Clark v. Poor*, supra. In the present act the amount of the tax is not dependent upon such use. It does not arise with an increase in mileage travelled, or even with the number of passengers actually carried on the highways of the State. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the carrying capacity of the vehicle. Accordingly, there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses."

In an annotation in 135 A.L.R. 1358, it is said: " . . . it is well settled that in the absence of Federal legislation especially covering the subject, a state may prescribe regulations governing the use of motor vehicles on its highways,

providing such regulations do not impose undue burdens on interstate commerce, and are reasonable and not discriminatory."

In the case of *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177, 82 L. Ed. 734, the question of the right of the state to restrict the width of motor vehicles operated on the state highways and the gross load carried, was involved. Mr. Justice Stone, speaking for the court, said: "Ever since *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints.

"The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 498; *Caldwell v. North Carolina*, 187 U. S. 622, 626. It was to end these practices that the commerce clause was adopted. See *Gibbons v. Ogden*, 9 Wheat. 1, 187; *Brown v. Maryland*, 12 Wheat. 419, 438-439; *Cooley v. Board of Port Wardens*, supra; *State Freight Tax*, 15 Wall. 232, 280; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 289, 297-298; *Cook v. Pennsylvania*, 97 U. S. 566, 574; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217; *Baldwin v. Seelig*, 294 U. S. 511, 522; *H. Farrand*. . . . Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. . . . Unlike the railroads, local highways are built, owned and maintained by the state or its municipal

subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse. * * *

"The nature of the authority of the state over its own highways has often been pointed out by this Court. It may not, under the guise of regulation, discriminate against interstate commerce. But 'In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.' *Morris v. Duby*, 274 U. S. 135, 143. This formulation has been repeatedly affirmed, *Clark v. Poor*, 274 U. S. 554, 557; *Sprout v. South Bend*, 277 U. S. 163, 169; *Sproles v. Binford*, 286 U. S. 374, 389, 390; cf. *Morf v. Bingaman*, 298 U. S. 407, and never disapproved. This Court has often sustained the exercise of that power although it has burdened or impeded interstate commerce. * * * Restrictions favoring passenger traffic over the carriage of interstate merchandise by truck have been similarly sustained, *Sproles v. Binford*, supra; *Bradley v. Public Utilities Comm'n*, 289 U. S. 92, as has the exaction of a reasonable fee for the use of the highways. *Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160; *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245; *Morf v. Bingaman*, supra; cf. *Ingles v. Morf*, 300 U. S. 290.

"In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states. * * *

When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. *Jacobson v. Massachusetts*, 197 U. S. 11, 30; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 365; *Price v. Illinois*, 238 U. S. 446, 451; *Hadacheck v. Sebastian*, 239 U. S. 394, 408-414; *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 530; *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 388; *Zahn v. Board of Public Works*, 274 U. S. 325, 328; *Standard Oil Co. v. Marysville*, 279 U. S. 582, 584. This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. *Morris v. Doby*, supra, 143; *Sproles v. Binford*, supra, 389, 390; *Minnesota Rate Cases*, supra, 399, 400; *Smith v. St. Louis & S. W. R. Co.*, 181 U. S. 248, 257; *Reid v. Colorado*, 187 U. S. 137, 152; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 42, 43.

The foregoing authorities clearly establish the right of the state to impose upon motor carriers engaged in interstate commerce exactions by way of taxes and licenses for use by such motor carriers of the state highways when such exactions are necessary to build, maintain, and supervise the highways. In addition the exactions must be such as are reasonably necessary for the purposes mentioned, and must not be discriminatory as between state and interstate carriers. It further appears to be the established rule of the federal courts to require the interstate carrier who challenges the right of the state to impose such licenses and taxes to affirmatively show that the exactions demanded are not necessary for the purposes mentioned or are discriminatory. In other words the burden is on the carrier to show wherein the exactions are unlawful as to him.

Adverting to the contention of the company that section 3847.27 is invalid, the trial court having so held, the Board contends the court's holding was erroneous.

The company's position is that as section 3847.23, Revised Codes, provides in part that it shall not be necessary for an interstate motor carrier to make any showing of public convenience and necessity in order to obtain a permit to operate in Montana, that it therefore necessarily follows that the company being an interstate carrier section 3847.27 does not apply to it, but only to intrastate carriers. To the contention that the Motor Carriers Act does not apply to the company, we do not agree. The Act was obviously intended to apply to all motor carriers operating over the highways of the state. See section 3847.1 (h) and 3847.16, Revised Codes. It clearly appears that the legislature was aware of decision of the Supreme Court of the United States with which the Act might conflict and endeavored to have the Act so drawn as to meet such a situation. By section 3847.24 of the Act provision is made by which if any part or provision is found to be unconstitutional it shall not affect the validity of the balance of the Act. Certain parts of section 3847.23, *supra*, were obviously incorporated in the Act for the same purpose, particularly that part of such section which provides that it shall be unnecessary for any interstate motor carrier to make any showing of public convenience and necessity in order to obtain a state permit. However, elimination of the part of section 3847.23 to which we have just referred does not abate the tax imposed by section 3847.27, Revised Codes. The company in support of its contention that Chapter 310 was designated to control intrastate motor carriers only, cites *Buck v. Kuykendall*, 267 U. S. 307, and *Bush & Sons Company v. Maloy*, 267 U. S. 317; twin cases, the opinion in both being delivered by Mr. Justice Brandeis. Both were rendered in January, 1925, and the Motor Carriers Act was not enacted until 1931, six years later.

In the first case Buck desired to operate an auto stage line for hire between Portland, Oregon, and Seattle, Washington. Oregon granted Buck a certificate of public convenience and necessity, but the state of Washington refused such a certificate. When the case in the course of litigation reached the Supreme Court of the United States, it was held that "the Washington statute is a regulation, not of the use of its highways, but of interstate commerce. Its

effect upon such commerce is not merely to burden but to obstruct it." That conclusion was predicated upon the proposition that the "primary purpose (of the statute requiring such a certificate) is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner." The decision in the Bush case was practically to the same effect and on similar facts. It is obvious that the two decisions were based upon the ground of unlawful discrimination. There is no showing of discrimination in the case at bar. All motor carriers are made subject to the same regulations, under our Motor Carriers Act.

The trial court held in the case at bar, "That section 3847.27, Revised Codes of Montana, 1935, as applied to the defendant is invalid for the reason that it fails to specify any method by which the gross operating revenue of the defendant in the state of Montana for any year may be determined, and for the further reason that the Public Service Commission for the state of Montana mentioned as the administrative body in sections 3847.26, 3847.27 and 3847.28, Revised Codes of Montana 1935, has nothing to do with the regulation and supervision of motor carriers using the public highways of the State of Montana."

On the question of the constitutionality of section 3847.27, this court said in the case of *State v. Stark*, 100 Mont. 365, 52 Pac. (2d) 890, that, "In determining whether an Act of the legislative assembly is invalid or not, it has long been the established rule of this court that the constitutionality of any act shall be upheld if it is possible to do so (*State ex rel. Tipton v. Erickson*, 93 Mont. 466, 19 Pac. (2d) 227; *Hale v. County Treasurer*, 82 Mont. 98, 105, 265 Pac. 6), and that a statute 'is prima facie presumed' to be constitutional, and all doubts will be resolved in favor of its validity. (*State ex rel. Toomey v. Board of Examiners*, 74 Mont. 1, 238 Pac. 316, 320). The invalidity of a statute must be shown beyond a reasonable doubt before this court will declare it to be unconstitutional. (*Herrin v. Erickson*, 90

Mont. 259; 2 Pac. (2d) 296).. And a statute will not be held unconstitutional unless its violation of the fundamental law is clear and palpable. (*Hill v. Rac*, 52 Mont. 378, 158 Pa. 826, Ann. Cas. 1917E, 210 L. R. A. 495)."

By reading sections 3847.27 and 3847.16 together, which the rule on statutory construction enjoins, *State v. Bowker*, 63 Mont. 1, 205 Pac. 961, it becomes clear that the clause in section 3847.27 imposing upon the company a tax of one-half of one per cent. based upon its "gross operating revenue" that in the use of this phrase by the legislature the gross revenue derived from operations in Montana was intended and not the company's gross revenue from all sources. No other reasonable intention is conveyed by paragraph (b) of section 3847.16 which is as follows:

"When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state."

"The legislative intention . . . is controlling." *State v. Smith*, 57 Mont. 563, 574, 190 Pac. 107, and cases cited. There could have been but one purpose in incorporating paragraph (b) in section 3847.16, namely, to ascertain the gross revenue derived by the company's operations in Montana in order to use that as a basis for the levy of the tax of one-half of one per cent.

It was said in *United States v. Freeman*, 3 Howard 565, (44 U. S. 548), "A thing which is within the intention of the makers of the statute, is as much within the statute as if it were in the letter." Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention

to which we do not agree, no difficulty would arise in putting into effect the minimum fee of \$15.00 required for each company vehicle operated within the state.

Furthermore, in this connection it is our opinion that when the legislature enacts a statute imposing the duty of enforcement of such statute upon a particular board or officer of the state but fails or neglects to clearly prescribe and incorporate in the Act the mode of enforcement, that such officer or board may adopt any fair and reasonable mode of enforcement designed to effectuate the purposes of the Act. In other words, when a duty is imposed upon a particular officer or board in express terms such other duties are implied as are necessary to carry into effect those that are expressed.

Such, we think, is the effect of the rule laid down in the case of *Morse v. Granite County*, 44 Mont. 78, 119 Pac. 286, and followed in *Fisher v. Stillwater County*, 81 Mont. 31, 261 Pac. 607; *Arnold v. Custer County*, 83 Mont. 130, 269 Pac. 396, and *State v. Stark*, 100 Mont. 363, 52 Pac. (2d) 890.

We do not agree with the trial court that the Public Service Commission "has nothing to do with the regulation and supervision of motor carriers using the public highways." The functions and duties of the Board relative to railroads, motor carriers, common carriers of oil, the inspection of boats and supervision of navigation, and public utilities, are closely related and the administration of the whole is upon a Board composed of the same three persons, and by reference many of the rules and regulations expressly applicable to one are also made applicable to another. The accounts and finances relating to each of these legislative Acts must of course be kept separate and distinct, but all are under the same management and we see no sound reason why the same overall board, while convened for the purpose of dealing with some railroad problem, may not at the same time dispose of questions relating to motor carriers or any other duty imposed upon the Board. The necessity of having minutes of such meetings kept separately as to the particular things done does not affect the

powers of the Board to dispose of, at the same time, other duties coming under its supervision.

The terms "Board of Railroad Commissioners" and "Public Service Commission" are used interchangeably and we think it was the legislative intent by section 3847.27 to use the words "Public Service Commission" as including the "Board of Railroad Commissioners." If this were not so, then section 3847.27 would have no meaning whatsoever, since strictly speaking the Public Service Commission does not issue certificates of public convenience and necessity.

The company contends that in fixing the exactions imposed upon it, no distinction is made between large and small vehicles, or heavy and light loads, nor the number of miles travelled over the highways. There is merit in this contention. The heavier the load and the greater the number of miles travelled the greater the wear and tear on the roadway. It is obvious that the tax set up in section 3847.27 was for the purpose of meeting this situation. A short trip and a light load would bring the carrier but little revenue whereas the heavier traffic and longer hauls would produce more revenue and require more taxes. Some discrimination may arise from the tax but in that respect we refer to what was said in *Hilger v. Moore*, supra, where at page 176 we find in the case of *Travelers Ins. Co. v. Connecticut*, 185 U. S. 364, 371, 46 L. Ed. 949, 22 Sup. Ct. Rep. 673, 676, this rule applied: "But, further, the validity of this legislation does not depend on the question whether the courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. The courts are not authorized to substitute their views for those of the legislature. We can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the state has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against nonresidents."

Again it is contended that revenue is demanded from the Company to be used to pay salaries of the Board members

and for other alleged unlawful purposes. We think a full and complete answer to all such contentions is found in the case of *Clark v. Poor*, 274 U. S. 554, at pages 556-557, where Mr. Justice Brandeis, speaking for the court, said: "The plaintiffs claim that, as applied to them, the Act violates the commerce clause of the Federal Constitution. They insist that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the State; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, . . . for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the State to ensure safety and convenience and the conservation of the highways. *Morris v. Duby*, ante, [271 U. S. 135] p. 135; *Hess v. Pawloski*, ante, [274 U. S. 352] p. 352. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. *Hendrick v. Maryland*, 235 U. S. 610; *Kane v. New Jersey*, 242 U. S. 160. Compare *Packard v. Banton*, 264 U. S. 140, 144.

"There is no suggestion that the tax discriminates against interstate commerce. Nor is it suggested that the tax is so large as to obstruct interstate commerce. It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the Commission in the administration or enforcement of the Act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs." To the same effect is *Dixie Ohio*

Express Co. v. State Revenue Comm. of Georgia, 306 U. S. 72, 83 L. Ed. 495.

In differentiating between the numerous decisions of the United States Supreme Court wherein questions involving interstate commerce were considered and determined it is important to keep in mind that actions involving the use of state highways for the purposes of interstate commerce have no relation to actions relating to railroads, telephone or telegraph lines, sleeping car or freight line owners, where all such facilities are owned by the particular public utility, and motor carriers operating over highways owned by the state. In the case at bar Montana owns the highways over which the company operates its vehicles and the taxes imposed are for the use of the state highways. The revenue collected is devoted to the building, repairing and policing of such highways, and that which the state furnishes is an aid, not a burden to interstate commerce.

The judgment of the lower court in restraining the Company from operating its vehicles over the highways of Montana until it shall have paid the exactions imposed pursuant to section 3847.16, Revised Codes, as set out in such judgment, is affirmed. As to the order of the lower court restraining the Board from enforcing the exactions imposed upon the Company by section 3847.27, Revised Codes, the cause is remanded with instructions to vacate and set aside such order, and enter judgment in favor of the Board in accordance with this opinion.

C. F. MORRIS,
Associate Justice.

We concur:

CARL LINDBQUIST,
Chief Justice;

HUGH R. ADAIR,

ALBERT H. ANGSTMAN,
Associate Justices;

Mr. Justice Cheadle:

Because of lack of time to study the foregoing decision, due to recess by the court, I reserve my opinion with the

understanding that it shall become a part of the foregoing, or a dissent thereto.

EDWIN K. CHEADLE,
Associate Justice,

Mr. Justice Cheadle dissenting:
Filed Sept. 19, 1946.

FRANK MURRAY,
Clerk of Supreme Court,
State of Montana.

The majority opinion is based upon and attempted to be supported by the fallacious premise that the exactions in question "are imposed upon the presumption that the state owns the highways within its borders, and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways." I can find no support for any such presumption. I fully appreciate the problem of maintaining our highways, and the necessity of exacting a fair compensation for their use by foreign-owned trucks, but I cannot, as a matter of expediency, lend my support to the exaction of such compensation by judicial edict.

Section 3847.27, Revised Codes, provides: "In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall . . . file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one per cent of the amount of such gross operating revenue; provided, however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars (\$30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars (\$15.00)."

Section 3847.28 provides: "All fees collected from motor carriers shall be, by the commission, paid into the state treasury and shall be, by the state treasurer, placed to the credit of the motor carrier fund. * * *". Disposition of this fund is directed by section 3847.17, as follows: "Such fund shall be available for the purpose of defraying the expenses of administration of this act and the regulation of the businesses herein described, and shall be accumulative from year to year. All expenses of whatsoever kind or nature of the board incurred in carrying out the provisions of this act shall be audited by the state board of examiners and paid out of the 'motor carrier fund.' * * *".

Since the defendant company is engaged solely in interstate commerce, three questions involving the interpretation of the quoted sections immediately present themselves, viz.: 1. Does section 3847.27 include only motor carriers holding a certificate of public convenience and necessity, or does it contemplate all motor carriers? Section 3847.23 contains the provision "that it shall not be necessary for any interstate or international motor carrier, in order to obtain a permit as herein provided, to make any showing of public convenience and necessity, except as to the transportation of passengers and/or freight between points within this state * * *". It would seem that the wording of section 3847.27 restricts the operation of that section to motor carriers to those holding certificates of public convenience and necessity. The defendant company, being engaged only in interstate commerce, is not included within such class.

2. In computing the amount of the exaction prescribed by section 3847.27 (one-half of one per cent of the amount of the gross operating revenue), what is to be the measure of the gross operating revenue of the carrier employed only in interstate commerce? Is it to be based upon the proportionate mileage travelled over Montana highways of the aggregate distance travelled by the vehicle? Or shall it be calculated upon the gross revenue of the carrier from all sources? If the provisions of this section were intended to include interstate motor carriers, it is apparent that the gross operating revenue, from whatever source, must be

the yardstick of the exaction. Such an exaction would be so manifestly unfair, discriminatory and unreasonable as to impel the conclusion that the legislature did not intend the inclusion of strictly interstate carriers. It is urged that the practice of the plaintiff board has been to exact only the minimum fee prescribed. But such is only a minimum, and is not an alternative exaction; and the test to be applied, of course, is what might be done under the statute, not what has been done.

3. Does the purpose for which the tax is collected and applied constitute an interference with and a burden upon interstate commerce, prohibited by the federal Constitution and statutes, as defined by the Supreme Court of the United States? The majority opinion quotes extensively from the leading case of *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183, 75 L. Ed. 953. But it would seem to me that the holding of that case refutes, rather than supports the conclusion arrived at here. As quoted in the majority opinion, Justice Brandeis in his opinion said: "While a state may not lay a tax on the privilege of engaging in interstate commerce, *Sprout v. South Bend*, 277 U. S. 163, it may impose upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon.

* * * As such a charge is a direct burden on interstate commerce, the tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use, * * * or by the express allocation of the proceeds of the tax to highway purposes, * * * or otherwise where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. 3* * *

Being free to levy occupation taxes, states may tax the privilege of doing an intrastate bus business without regard as to whether the charge imposed represents

merely a fair compensation for the use of their highways.

But since a state may demand of one carrying on an interstate bus business only fair compensation for what it gives, such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes. Being valid only if compensatory, the charges must be necessarily predicated upon the use made, or to be made, of the highways of the state. * * * In the present act the amount of the tax is not dependent upon such use. It does not rise with an increase in mileage travelled, or even with the number of passengers carried on the highways of the state. Nor is it related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights, except in so far as this is indirectly affected by carrying capacity. The tax is proportioned solely to the earning capacity of the vehicle. Accordingly, there is no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses."

For two reasons, then, it is apparent that the imposition in question is not, and was not intended to be, exacted as compensation for use of state highways by interstate motor carriers. First, the act specifically provides that the funds derived shall be used for defraying the expenses of the board of Railroad Commissioners in administering the Motor Carriers Act. This court will take judicial notice of the fact that the building and maintenance of state highways, and regulation of traffic thereon, is a function of the state highway department, and entirely foreign to the prescribed functions and powers of the Railroad Commission. Secondly, the amount and character of the attempted imposition bear no relation to the only purpose for which such imposition would be valid, that is, as compensation for use of the state highways. And this is so no matter which method is applied in determining the gross operating revenue. As in the Lindsey case, this exaction is proportioned only to the earnings of the vehicle. I think there can be no question but that the state has power, by appropriate legislation, to require compensation for the use of its highways

by vehicles engaged in interstate commerce. I further think that such legislation must emanate from the legislative arm of the state government. This court may, perhaps, point out that the state is overlooking a possible source of revenue for the maintenance of its highways, but may not enact the legislation for the purpose of its collection, under the guise of judicial interpretation.

EDWIN K. CHEADLE,
Associate Justice.

APPENDIX "B"

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 8646

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF MONTANA, Paul T. Smith, Leonard C. Young and Horace F. Casey, as members of and constituting the Board of Railroad Commissioners of the State of Montana, Plaintiffs and Appellants on Appeal of said Board, and Respondents on Cross-Appeal of Aero Mayflower Transit Company, a corporation,

VS.

AERO MAYFLOWER TRANSIT COMPANY, a corporation, Defendant and Respondent on Appeal of said Board, and Appellant on Cross-Appeal of Aero Mayflower Transit Company, a corporation.

PETITION BY AERO MAYFLOWER TRANSIT COMPANY FOR REHEARING

Comes now Aero Mayflower Transit Company, Respondent on the Appeal of the Board of Railroad Commissioners herein, and Appellant on the Cross-Appeal of Aero Mayflower Transit Company herein, and respectfully petitions for a rehearing en banc of all the issues on appeal before this Honorable Court, upon the following grounds: "

(I) That a fact, material to the decision, was overlooked by the Court;

(II) That a question decisive of the case submitted by counsel was overlooked by the Court;

(III) That the decision is in conflict with an express statute to which the attention of the Court was not directed.

(IV) That the decision is in conflict with a controlling decision to which the attention of the Court was not directed.

STATEMENT

This Court, like all Courts operating in the Anglo-American tradition of a government of law and not a government of men, expressly recognizes that its opinions, expressions and decisions are not infallible. For that reason, and, also, because it desires the aid of litigants and counsel in the production of opinions resting on the integrity of reasoned internal structure, this Court has by its own rules, provided for rehearings, and petitions for rehearings in every case coming within its Rule XV. In the spirit of that rule the undersigned counsel files and presents this Petition for Rehearing, confident that this Court is desirous of withholding from the Montana Reports any expression or decision which is freighted with its own internal contradictions and misstatements of fact, as well as law, and which denies effect to the Federal Constitution.

Desirable as it may be for the Legislature to impose on an interstate motor carrier some form of taxation, constitutional in substance and effect, by way of compensation for the use of the highways of Montana, *it simply is not the business* of the judiciary to supply the imposition, and the absence of proper legislative action confers no such authority on the judiciary, nor do erroneous statements of fact or law supply such authority. The vice of the opinion, as counsel understands it, is that the Court under the mandate to uphold legislative enactments misreads that mandate to mean that *the court is required to supply legislative deficiencies*, i.e., the bricks of the wall, and not the judicial mortar of construction. And in supplying judicial mortar, the straw of erroneous factual assumptions corrupt the mass.

These appeals come to this Court after long, serious and patient judicial review by the trial judge. Certainly, he

was just as anxious "to vindicate the constitutionality of the statutes" as this Court. *He could not sustain the tax on the gross revenue of the interstate operator from interstate operations only, because it was a privilege tax merely, a tax on the bare privilege of carrying on interstate commerce, in violation of the Federal Constitution. He refused, by judicial amendments to legislate where the legislature had not done so, i.e., relate it to compensation for use of the highways, or to defray the expense of regulating motor traffic. And we submit that nothing in this Court's opinion of June 29, 1946, overcomes or challenges the soundness of that conclusion. We first advert to the internal construction of the opinion.*

A

Argument (Points 1 to 4 of Petition, inclusive)

UNTRUE AND INCORRECT STATEMENTS IN THE OPINION VITIATING ITS RATIONALE

Every lawyer practicing before this Court owes to the Court the duty of pointing out untrue, incorrect or erroneous statements of fact or of law, or both, in the opinions emanating from the Court. This duty should be discharged by members of the bar irrespective of whether they are counsel in a given action. A fortiori, when they are counsel, and such erroneous statements are foundation material for erroneous conclusions.

(a) In the first paragraph of the opinion it is said:

"This controversy involves the question as to what extent a state may impose burdens in the way of licenses and taxes upon motor carriers engaged in interstate commerce for operating their vehicles over the highways of the state. Such exactions are imposed upon the presumption that the state owns the highways within its borders and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways."

Passing over the fact that the carrier here is engaged *solely* in interstate commerce (as found in Par. 3 of the opinion) the statement that the taxes are exacted as compensation for the use of the highways,

"and the revenue derived therefrom shall be expended to build, maintain and supervise such highways,"

is not true as to the quoted words.

Sections 3847.16, 3847.17 and 3847.27 covering both the \$10.00 flat per vehicle tax and the $\frac{1}{2}$ of 1 per cent gross revenue tax, *pass the tax to the motor carrier fund* which

"shall be available for the purpose of defraying the expenses of administration of this Act (the Motor Carrier Act) and the regulation of the businesses herein described"* (*Parenthesis ours)

Not one cent goes to build any Montana highway.

Not one cent goes to maintain any Montana highway.

Not one cent goes to supervise any Montana highway.

Surely, the Court does not desire such erroneous statements to stand. And yet they are the very foundation—the rationale—of the opinion, for that error is repeated again and again in the opinion, viz.,

In Paragraph 19, page 13, it is said:

"The foregoing authorities clearly establish the right of the state to impose upon motor carriers engaged in interstate commerce exactions by way of taxes and license for use by such motor carriers of the state highways when such exactions are necessary to build, maintain, and supervise the highways. In addition the exactions must be such as are reasonably necessary for the purposes mentioned, and must not be discriminatory as between state and interstate carriers."

In the next to the last paragraph of the opinion, page 21, it is said:

"In the case at bar Montana owns the highways over which the company operates its vehicles and the taxes imposed are for the use of the state highways. The

revenue collected is devoted to the building, repairing and policing of such highways, and that which the state furnishes is an aid, not a burden to interstate commerce."

The Board of Railroad Commissioners in this case never made any contention that the revenues from these license taxes were to be used for *building, maintaining or supervising highways*. The Board could not do so, and claim the fees. The revenue is for "*the expenses of administration of this act (Motor Carrier Act) and the regulation of the businesses herein described,*"

a far different purpose, than highway building, repair and supervision.

During the argument in open Court, it was made clear that the revenues from the taxes in question were not levied for, or in fact used for, or divested to highway construction, maintenance, repair and supervision. (And so, too, the Brief of Aero in this case. Appellant Aero pages 51, et seq.)

Thus, it is seen that the opinion begins and concludes on the erroneous statement that the revenues from these taxes are for highway building, repair and supervision. Surely, the Court will recall, on reading this petition, that revenues for highway building, repair and supervision come only from gasoline license taxes in Montana collected by the State Board of Equalization and administered by the Montana Highway Commission, and that the Board of Railroad Commissioners has nothing to do with such exactions.

The idea that these revenues attempted to be exacted from Aero are for highway construction, maintenance, repair and supervision, is so firmly fixed in the court's minds, apparently, that the opinion cites *Interstate Transit vs. Lindsey*, 283 U. S. 183, 75 L. Ed. 953, in support of its reasoning. But in that case, Mr. Justice Brandeis, writing for the United States Supreme Court, *invalidated a Tennessee statute for the very reason that the tax "was not,"* in the court's words, "*exactd for such purposes,*" i.e., construction or maintenance of highways or bridges, "*but merely as a privilege tax on the carrying on of interstate*

business." The Justice pointed out that in Tennessee, as in Montana, the revenues for highways came from other taxes. The case is a plain, unassailable authority for Judge Lynch's opinion. And yet the opinion in this case (Par. 19, page 13) uses it as authority to bolster the erroneous assumption that the Montana licenses are to build, maintain and supervise highways.

(b) Another statement, at once incorrect and misleading, is found in Paragraph 5 of the opinion, where it is stated: (Page 3)

"It appears that the Board has heretofore and for some years collected two separate exactions from the Company: The Registration License Tax authorized by sections 1760-1760.10, Revised Codes; and the tax on sales of gasoline, authorized by sections 2381.1 to 2396.9, Revised Codes."

Surely this Court does not desire to represent that the Board of Railroad Commissioners collects either,

(a) the registration fees collected by the Registrar of Motor Vehicles (Sections 1760-1760.10, R.C.M. 1935); or

(b) the gasoline license tax collected by the State Board of Equalization. (Sec. 2381.1-2396.9, R.C.M. 1935.)

What purpose can be subserved by the inclusion of this erroneous statement? Surely, the first erroneous utterance can not be bolstered by a second. The Board of Railroad Commissioners makes no claim to collect these taxes. These incorrect statements show very clearly the necessity for a rehearing in this action, for these factual errors make manifest that whatever the cause, the basic material facts in the case remain obscure to the court. And where the basic facts remain obscure, the legal conclusions are without foundation. If counsel for appellant Aero is in any way responsible for such errors, he now apologizes to the Court. But, upon rereading Aero's briefs, he does not find any such misstatements in the briefs.

B

THE INTERNAL CONTRADICTIONS VITIATING THE OPINION AS
RESPECTS THE GROSS REVENUE TAX.

(a) In paragraph 3, page 2 of the opinion, this Court clearly states the undisputed and indisputable fact that the operations of Aero Mayflower Transit Company are wholly interstate. The opinion says:

"There is no dispute as to the facts. The Company is engaged in the motor transportation of used or second hand household goods and office furniture from one state to another for hire. It does not transport any goods of any nature or kind from one point to another in the same state. *The only transportation it engages in, so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state.*"

In paragraph 25, page 17 of the opinion, the opinion states:

"By reading sections 3847.27 and 3847.16 together, which the rule on statutory construction enjoins, *State v. Bowker*, 63 Mont. 1, 205 Pac. 961, it becomes clear that the clause in section 3847.27 imposing upon the company a tax of one-half of one per cent based upon its 'gross operating revenue' that in the use of this phrase by the legislature the gross revenue derived from operations in Montana was intended and not the company's gross revenue from all sources. No other reasonable intention is conveyed by paragraph (b) of section 3847.16 which is as follows:

"When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and

such other information concerning its operation within this state as may be required, by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state.' "

In paragraph 26, page 18 of the opinion, it is stated:

"It was said in *United States v. Freeman*, 3 Howard, 565, (44 U. S. 548); 'A thing which is within the intention of the makers of the statute, is as much within the statute as if it were in the letter.' Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention to which we do not agree, *no difficulty would arise in putting into effect the minimum fee of \$15.00 required for each company vehicle operated within the state.*"

Thus the opinion, in one breath finds Aero's operations interstate only, and then in the next breath says that irrespective of that fact, Aero is liable for a minimum of a \$15.00 fee, even though it receives no revenue in Montana, and it would be liable for such excess over \$15.00 as the Commission might arbitrarily undertake to impose, even though it did no business at all in Montana. If there must first be revenue from an operation in Montana before any part of this statute is applicable to the Aero Mayflower Transit Company, (and the undisputed fact is that it does no business in Montana,) *then the imposition of a minimum of \$15.00 for revenue tax becomes a privilege tax and nothing else.* That is a wholly inconsistent attitude and should be corrected by our Supreme Court.

In other words, *we submit that this Court must agree with the words of the statute and with both Aero and the Board in its interpretation that the tax under Section 3847.27 is a tax on gross operating revenue—without revenue there can be no tax at all, for the legislature has laid the tax on revenue.* The \$15.00 is not another flat per vehicle tax; (supplied by Section 3847.16) it is the minimum tax only when gross operating revenue is present, according to the court's language (Par. 25, page 17 of opinion). "the gross revenue derived by the company's operations in

Montana." Now, since there are no operations in Montana, as the opinion concedes (Par. 3, page 2 of opinion) \$15.00 may not be taken from the operator just because it is easy to say "Give us \$15.00." The error in the opinion stems from the fact that the Court confuses the \$15.00 minimum exaction under a gross revenue tax *where revenue is present*, a mill, a cent, a dollar, or more, with a fee for operating a vehicle in the State, regardless of revenue from the operation. *The \$15.00 is not a fee for operating a vehicle*; it is a minimum fee upon gross revenues when $\frac{1}{2}$ of 1% of gross revenues do not amount to the sum of \$15.00. Operating fees are covered by the Registration License Tax administered by the Registrar of Motor Vehicles, by the Gasoline License Tax administered by the State Board of Equalization, and by Section 3847.16, imposing the flat \$10.00 fee "for every motor vehicle *operated*" by a motor carrier "over or upon the public highways of this State." Surely the Court will correct its opinion in this respect. It will not assume to hold the \$15.00 minimum of the gross revenue tax, a flat per vehicle operating tax. There must be revenue before any part of that tax is collectible.

The Court cites Justice Brandeis's language in *Interstate Transit, Incorporated vs. Lindsey*, 283 U. S. 183, 75 L. Ed. 953, wherein he said,

"While a state may not lay a tax on the privilege of engaging in interstate commerce," . . .

but ignores that fundamental prohibition, by upholding as a tax on revenue from interstate commerce, a \$15.00 exaction when there is no revenue from operations in Montana, and orders the wholly interstate operations of Aero to cease if Aero does not pay \$15.00 from Montana revenues when there are no Montana revenues. By such a ruling, Montana can effectually arrest and stop all interstate commerce across its borders.

Another misconception, related to the failure to grasp the true meaning of the \$15.00 minimum is found in Par. 8 of the opinion, where the Court says:

"The effect of the trial court's order enjoining the Board from enforcing any of the provisions of section

3847.27, Revised Codes, is to relieve the Company from the obligation to comply with the Board's demand to pay the tax of one-half of one percent of its gross revenue or the minimum fee of \$15.00 on each vehicle operated over the roads of the state." (Italics ours).

The tax under Section 3847.27 is not in the alternative, i. e. $\frac{1}{2}$ of 1 per cent of gross revenue, or \$15.00 per vehicle operated; the \$15.00 is a proviso whereby a minimum in that amount is fixed if the application of the percentage factor does not produce more than \$14.9999.

We have demonstrated above that two facts material to the decision were overlooked by the Court in that no account of them was taken in final conclusion, i. e.

(1) That no part of the (a) \$10.00 per vehicle flat fee, or (b) the gross revenue fee is destined for, or used for, the construction, maintenance, repair or supervision of the highway; and

(2) That Aero has no revenues from any "operations in Montana" for it operates in interstate commerce only.

Referring again to the *second ground for rehearing*, the question decisive of the case submitted by counsel, overlooked by the court, is that the statute does not supply, the Board has not assumed to supply, and this Court does not supply, in its opinion, any yardstick whatever to "ascertain the gross revenue derived by the company's operations in Montana," which, the opinion says, is to be used "as a basis for the levy of the tax of one-half of one per cent."

What the opinion does not do, and what it does, as respects the gross revenue tax, is this:

It does not mention, or address itself to, or in any manner attempt to dispose of these cases from the Supreme Court of the United States, holding that the State may not tax interstate commerce as such, the right to engage in interstate commerce, or the gross receipts of purely interstate commerce transactions, viz.:

J. D. Adams Mfg. v. Storen, 304 U. S. 307, 82 L. ed. 1365;

Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015;

Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 230, 30 L. ed. 888, 7 S. Ct. 857, 1 Inters. Com. Rep. 51;

Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 7 S. Ct. 1118, 1 Inters. Com. Rep. 308;

Galveston, H. & S. A. R. Co. v. Texas, 219 U. S. 217, 52 L. ed. 1031, 28 S. Ct. 638;

Meyer v. Wells, F. & Co., 223 U. S. 298, 56 L. ed. 445, 32 S. Ct. 218;

Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 400, 57 L. ed. 1511, 1541, 33 S. Ct. 729, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 62 L. ed. 295, 38 S. Ct. 126;

United States Glue Co. v. Oak Creek, 247 U. S. 321, 328, 62 L. ed. 1135, 1141, 38 S. Ct. 499, Ann. Cas. 1918E, 748;

New Jersey Bell Teleph. Co. v. State Bd. of Taxes & Assessments, 280 U. S. 338, 349, 74 L. ed. 463, 469, 50 S. Ct. 111;

Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 297 U. S. 650, 655, 80 L. ed. 956, 959, 56 S. Ct. 608;

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90, ante, 64, 58 S. Ct. 72;

Western Live Stock v. Bureau of Revenue, No. 322, October Term, 1937 (303 U. S. 250, ante, 823, 58 S. Ct. 546, 115 A. L. R. 944).

It ignores the decision of the Supreme Court of the United States uttered by Mr. Justice Hughes in a unanimous opinion, condemning a Montana tax on all business, interstate and intrastate, of a telephone company in

Cooney v. Mountain States Telephone and Telegraph Co., 79 L. Ed. 934.

The opinion ignores the long line of cases from this Court, the Supreme Court of Montana, recognizing and enforcing the above principles, in cases dealing with interstate commerce, cases directly in point.

State v. Great Northern Railway Co., 14 Mont. 381; 36 Pac. 458;

State v. Northern Pacific Express Co., 27 Mont. 419; 71 Pac. 404;

State v. Western Union Telegraph Co., 43 Mont. 445; 117 Pac. 93;

C. M. & St. P. Ry. Co. v. Swindlehurst, 47 Mont. 119; 130 Pac. 966;

J. I. Case Threshing Machine Co. v. Stewart, 60 Mont. 380; 199 Pac. 909;

C. M. St. P. & P. RR. v. Harmon, 89 Mont. 1, 295 Pac. 762;

Interstate Transit Co. v. Derr, 71 Mont. 222, 228 Pac. 624;

State v. Silver Bow Refining Co., 78 Mont. 1, 252 Pac. 301;

Fruitgrowers Express Co. v. Brett, 94 Mont. 281, 22 Pac. 42d 171.

These holdings are in no manner affected by the fact that the commerce moves by rail instead of by truck. And the Derr case dealt with interstate movement by truck.

The opinion does, sub silentio, confess the weight of those cases, however, for it pares down Section 3847.27, the gross revenue tax statute, which in terms applies to,

"the gross operating revenue of such carrier for the preceding three months of operation," etc. (Page 5)

to mean,

"the gross revenue derived from operations in Montana," (Page 17)

and ~~by~~ reference to sub-paragraph (b) of Section 3847.16, to mean,

"the gross revenue derived by the company's operations in Montana in order to use that as a basis for the levy of the tax of one-half of one per cent." (Page 17)

The opinion does, in substance, admit that this construction is a judicial gratuity, and unwarranted as such, for it says,

"Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue

is not provided by the statute, a contention to which we do not agree," etc., and then proceeds to excuse the omission by saying "no difficulty" arises with reference to the \$15.00 minimum.

The minimum is merely the tail, not the hide:

Let us take the Court at its word and test the basis so found. Let us remember that the only transportation Aero engages in, as the opinion says, (Paragraph 3, page 2):

"... so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state."

The service may be paid for by consignor, by consignee, or by some third person. *Not one dollar of the payment may come from any source in Montana.* What is the business done in Montana? The Court says it is *transportation*, i.e., the movement of goods in a motor vehicle over the highways of the state.

(a) Where no dollar is received in Montana, what is the basis of apportionment of Aero's gross revenues, received outside of Montana?

On Montana mileage against system mileage?

On mileage with load?

On mileage without load?

On a per vehicle basis? Loaded vehicles only? Or all vehicles loaded or empty?

(b) If a consignor or consignee in Montana pays for the interstate service, what is the basis of the apportionment of gross revenues?

The dollars originating in Montana against system gross dollars?

Weighted by any factor of highways use?

Weighted by any factor of mileage?

(c) What relation is there between "the gross revenue derived from operations in Montana," as the Court says, and "transportation" in Montana?

Who is to determine the basis of apportionment? The Board? *The legislature did not say so. The legislature did not say that the Board could select any method it pleases. The legislature did not say this Court could select the method.* The legislature simply failed to provide a method and, accordingly, a workable law for gross revenue apportionment, assuming that it could within the Federal Constitution.

The opinion really recognizes this condition, and in final analysis attempts to excuse it in this language:

"Furthermore, in this connection it is our opinion that when the legislature enacts a statute imposing the duty of enforcement of such statute upon a particular board or officer of the state but fails or neglects to clearly prescribe and incorporate in the Act the mode of enforcement, that such officer or board may adopt any fair and reasonable mode of enforcement designated to effectuate the purposes of the Act. In other words, when a duty is imposed upon a particular officer or board in express terms such other duties are implied as are necessary to carry into effect those that are expressed.

"Such, we think is the effect of the rule laid down in the case of Morse v. Granite County, 44 Mont. 78, 119 Pac. 286, and followed in Fisher v. Stillwater county, 81 Mont. 31, 261 Pac. 607; Arnold v. Custer County, 83 Mont. 130, 269 Pac. 396, and State v. Stark, 100 Mont. 365, 52 Pac. (2d) 890.

That language has no support in the facts, and no support in the law.

No support in the facts—for the omission in the statute is not omission of a "mode of enforcement," but of a *method of taxation*.

No support in the law,—because the duty of apportionment is not a mere administrative rule-making authority, but a duty of substantive law, not of a rule-making agency.

And this Court, up to now, has uniformly insisted on the strict construction of taxing statutes:

Shubert v. Glacier County, 93 Mont. 160, 18 Pac. (2nd) 614;

Vennekolt v. Lutey, 96 Mont. 72, 28 Pac. (2d) 452;
 Mills v. State Board of Equalization, 97 Mont. 13, 33
 Pac. (2nd) 563;
 State ex rel. Whitlock v. Board of Equalization, 100
 Mont. 72, 45 Pac. (2nd) 684;
 Montana Life Ins. Co. v. Shannon, 106 Mont. 500, 78
 Pac. (2nd), 946;
 Vantura v. Montana Liquor Control Board, 113 Mont.
 265, 124 Pac. (2nd) 569;
 U. S. Gypsum Co. v. State Board of Equalization, 116
 Mont. 275, 149 Pac. (2nd) 774.

And see: Sutherland, Statutory Construction, (3rd Ed.
 Horack) Ch. 67, Secs. 6701 and 6705.

None of the four (4) cases cited in the opinion are applicable, because none of them relate to the taxing power, or present a situation where an administrative tribunal is permitted to invent a method of tax apportionment, or to select between possible methods of tax apportionment, or authorize the court to change the words of a statute.

In the *Morse case*, 44 Mont. 78, it was shown that the Board of County Commissioners had express statutory authority to build a Court House, and, also, to issue bonds.

In the *Fisher case*, 81 Mont. 31, the Court found that "the law authorizes the expenditures," and this finding is supported by the most explicit terms of the statute itself.

In the *Custer County case*, 83 Mont. 130, this Court pointed out that the express terms of the statutes gave the County Board implied authority for its acts, saying of the statutes, "*We do the italicizing and direct special attention to the italicized words.*"

In the *Stark case*, 100 Mont. 365, the plumbing board was told by the statute to give examinations to would-be plumbers and complaint was made that there were no standards specifying the nature of the examination. The Court found that the Act itself indicated the nature of the examination by requiring examiners to be versed in modern sanitary plumbing and sewage and applicants to be examined on their fitness to engage in the business.

But Section 3847.27, in express terms, commands the Board to lay a tax on

"the gross operating revenue of such carrier."

The statute commands that, and that alone. It is not a question of the statute omitting to fill in details. The question is, has the Board the authority to do what the statute commands it not to do, i.e.,

"to lay a tax on anything less than 'the gross operating revenue'?"

The opinion says "*yes the Board can lay a tax on Montana revenues only, and it can follow any method it pleases to determine what are Montana revenues.*"

That is the vice of the opinion—that the Board can invent any method it pleases to determine what are gross operating revenues in Montana. We challenge counsel to produce a single case upholding such a conclusion.

Since the \$10.00 flat per vehicle tax laid under Section 3847.16 is not laid for construction, maintenance, repair or supervision of highways, but solely because Aero operates a motor vehicle over the highways—irrespective of any revenue accruing from the operation—it is obvious that it, too, is a mere tax for the privilege of operating in a motor vehicle in interstate commerce and as such falls under the very language of Justice Brandeis quoted by the Court in the opinion.

CONCLUSION

In conclusion, it is respectfully submitted that a complete rehearing of all the issues herein should be had because,

I. The opinion is built on misstatements of fact, and consequent misconceptions of law, which, when removed and excised from the opinion, as they must be in the light of the true facts, leave the opinion without any foundation upon which to stand; and,

II. There is no authority in reason, in law, or in judicial precedent, for this Court, or any other American Court, holding that an administrative tribunal has the power on

its own motion to invent a method, formula, or rule for apportionment of a tax when the legislature has commanded that no apportionment is to be attempted, and in any case, has set no standard, rule or formula for any apportionment.

III. The decision of Judge Lynch should be affirmed, for if that is not done the doctrine of non-delegability of the power to tax is nullified, and an administrative tribunal given the power to invent a tax which only the legislature may do, consistent with the Federal and State Constitutions.

Submitted with respect, and in confidence that the Court desires naught but truth in its opinions.

EDMOND G. TOOMEY,
Attorney for Petitioner.

(9013)

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SEP 22 1947
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

No. 39

AERO MAYFLOWER TRANSIT COMPANY,

Appellant,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF MONTANA, ET AL.,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

BRIEF OF APPELLANT

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 39

AERO MAYFLOWER TRANSIT COMPANY,
Defendant and Appellant,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE
(STATE OF MONTANA, ET AL.,

Plaintiffs and Appellees

BRIEF OF APPELLANT

Opinion Delivered by the Court Below

The opinion delivered by the Supreme Court of Montana, (written by Mr. Justice Morris and concurred in by Chief Justice Lindquist and Justices Adair and Angstman) dated June 29, 1946, is reported as *Board of Railroad Commissioners v. Aero-Mayflower Transit Co.* in 172 Pacific (2d) 452, and is set forth at pages 103-119 of the Transcript of Record on this appeal. This opinion does not appear in any extant volume of the Montana Reports. The last printed volume of such Reports (116) contains no reference to cases decided after February 10th, 1945.

The reserved and dissenting opinion of Mr. Justice Cheadle of the Supreme Court of Montana, filed September 19th, 1946, is found subjoined to the principal opinion in 172 Pacific (2nd) at page 462, and is set forth at pages 119-123 of the Transcript of Record on this appeal.

Jurisdiction

A complete Statement as to Jurisdiction has heretofore been printed and filed, and this Court, on March 10th, 1947, noted probable jurisdiction (R. 161).

Jurisdiction of this appeal is based upon Section 237(a) of the Judicial Code of the United States, cited as Section 344(a), Title 28, United States Code, annotated.

Briefly, this appeal is prosecuted from a final judgment and decree of the Supreme Court of the State of Montana which restrains and enjoins the appellant (defendant below) Aero Mayflower Transit Company, a motor carrier of household goods and office furniture, moving only in interstate commerce, from operating in interstate commerce over the public highways of the State of Montana, until the carrier pays to the Board of Railroad Commissioners of the State of Montana, for the years 1937, 1938 and 1939, two (2) different kinds of taxes imposed upon its interstate operations by virtue of two (2) different statutes enacted by the legislative assembly of the State of Montana at different times, viz.,

(1) a "flat" or "straight" \$10.00 per annum tax on each vehicle operated by the carrier over the public highways of the State of Montana, imposed by Sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935 (Volume 2 of Codes, pp. 688 and 689), originally enacted as Sections 16, 17 and 18 of Chapter 184, Laws of Montana, 1931; and, also,

(2) a quarterly tax of one-half of one percent ($\frac{1}{2}$ of 1%) of the gross operating revenue of the carrier,

imposed by Sections 3847.27 and 3847.28, Revised Codes of Montana, 1935 (Volume 2 of Codes, pp. 691 and 692), originally enacted as sections 2 and 3 of Chapter 100, Laws of Montana, 1935;

each of said taxes being laid, in the words of such statutes, "in addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state." The statutes are found in the Appendix to this Brief, at pages 93 through 100 of such Appendix, and the quotation just stated from the text of each at pages 93-95 for the "flat" vehicle tax and at pages 96-100 for the gross revenue tax. Both the "flat" per vehicle tax and the gross revenue tax were challenged by the carrier (a) before the Board of Railroad Commissioners of Montana which was the administrative agency charged with administering the vehicle tax, and, purportedly, the gross revenue tax (R. 36-45, (b) before the District Court of Silver Bow County, Montana, in which Court the Board sought an injunction restraining the carrier from operating in interstate commerce over the highways of Montana until it paid both taxes (R. 6-46, in particular, Sections G-M of Aero's Answer in the District Court, the Court of first instance, R. 21-34; R. 73-95), (c) before the Supreme Court of Montana (Opinion, R. 106, 107, 113; Petition for Rehearing, R. 124-139) and in this Court (R. 146-151) on multiple grounds reiterated in the Assignment of Errors in this Court (*id.*) *i. e.*, that each of the taxes as applied to appellant's interstate operations violate Sec. 8 of Article I, the Commerce Clause of the Constitution of the United States, the due process clause of Sec. 1 of Amendment 14, and the equal protection of the laws clause of Sec. 1 of Amendment 14 of the Constitution of the United States, thus repeatedly raising the Federal questions. Both taxes were also challenged on the ground that each statute violated the due process clause of Sec. 27 of Article III of

the Constitution of Montana, if construed to be applicable to the interstate operations of the carrier which undertakes no operations in intrastate commerce (Pars. H-K of Aero's Answer at R. 23-32).

These multiple and repeated challenges to each, the vehicle tax and the gross revenue tax, were disposed of below as follows:

The Board of Railroad Commissioners of Montana, after a hearing, by its administrative order of October 9, 1939, assumed to cancel a "permit" theretofore issued to appellant to operate in interstate commerce because of the non-payment of the taxes and fees in question for the years 1937, 1938 and 1939 (R. 45-46).

On October 13, 1939, the Board followed its administrative action by filing in the District Court of the Second Judicial District of the State of Montana, in and for Silver Bow County, at Butte, a suit in equity, to restrain appellant from operating in interstate commerce, until it paid the taxes and fees for which the Board made claim (R. 1-4). Appellant, as defendant in the suit, defended on the merits (R. 5-95) and after trial, the District Court of Silver Bow County by Findings of Fact and Conclusions of Law (R. 95-97) and Amended Final Judgment (R. 97-98),

(a) *upheld* the validity of the "flat" or "straight" per vehicle tax imposed by sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935, and restrained appellant from operating in interstate commerce until such taxes were paid for the years 1937, 1938 and 1939 (R. 95-97; 97-98), but, on the other hand,

(b) *denounced* the gross revenue tax as imposed by sections 3847.27 and 3847.28, Revised Codes Montana, 1935, as invalid, and enjoined the Board from enforcing or applying such taxes against appellant (R. 95-97; 97-98).

Aero (appellant here) appealed to the Supreme Court of Montana from that part of the District Court judgment adverse to it, *i. e.*, upholding the validity of the "flat" or "straight" \$10.00 per vehicle tax (R. 99-100). The Board appealed to the Supreme Court of Montana from that part of the District Court judgment adverse to it, *i. e.*, holding the gross revenue tax unconstitutional and void (R. 99). Each appellant specified errors in the rulings of the lower court adverse to it (R. 100-102).

The Supreme Court of Montana found that the gross revenue tax was valid, and, accordingly, *reversed* the judgment of the District Court of Silver Bow County as to that tax; the Supreme Court *affirmed* the trial court's conclusion that the "flat" or "straight" per vehicle tax was valid (R. 123). Thus, the applicability and the constitutionality of both taxes to appellant's interstate operations was affirmed by the highest court of the State of Montana (Opinion, 103-119) four of the five Justices of that Court concurring (R. 119) and one Justice dissenting from the conclusions of the majority as to both taxes (R. 119-123).

Upon remand to the District Court, judgment on remittitur was filed by that Court on October 28th, 1946 (R. 140-141), restraining appellant from operating its motor vehicles over and upon the public highways of the State of Montana until it paid to the Board both the vehicle tax and the gross revenue tax, in stated sums for each the years 1937, 1938 and 1939. This judgment was superseded by a judgment of the District Court filed January 3, 1947, incorporating the terms of its judgment of October 28, 1946, and adding the further restraint, in the presence of the stay bond filed in the District Court, enjoining appellant from operating over the highways of Montana until both kinds of taxes for the year 1940 "and each subsequent year" be paid to the Board (R. 154-156).

Supersedeas bond on appeal in the penal sum of \$20,000.00 was approved by the Supreme Court of Montana when appeal was taken to the Supreme Court of the United States on December 16th, 1946 (R. 153), and on the same day the Supreme Court of Montana stayed all proceedings on its final judgment, "until the final determination of said appeal on mandate from the Supreme Court of the United States to the Supreme Court of Montana" (R. 152).

Statement of the Case

On October 3, 1935, the Board of Railroad Commissioners of the State of Montana (hereinafter referred to as "the Board") assuming to act under the provisions of Chapter 184, Laws of Montana, 1931, an act entitled: "An Act Providing for the Supervision, Regulation and Control of the Use of the Public Highways of the State of Montana by Motor Carriers Engaged in the Transportation by Motor Vehicles of Persons and Property for Hire Upon the Public Highways of the State of Montana; Conferring Certain Jurisdiction Over Such Transportation, Motor Vehicles and Their Operations, Upon the Board of Railroad Commissioners; Providing for the Enforcement of this Act and the Punishment for Violation Thereof; and Repealing Chapter 154, Laws Eighteenth Legislative Assembly, 1923, as Amended by Chapter 103, Laws Nineteenth Legislative Assembly, 1925, and as Amended by Chapter 141, Laws Twenty-first Legislative Assembly, 1929," (Laws of the Twenty-second Legislative Assembly of the State of Montana, 1931; at page 491, (subsequently and now codified as Chapter 310 of the Political Code, Volume 2, Revised Codes of Montana, 1935, Page 679, containing Sections 3847.1 through 3847.25, R.C.M. 1935) issued to Aero Mayflower Transit Company, a corporation, appellant, (hereinafter abbreviated to "Aero"), a so-called "permit" numbered

1354, authorizing it to transport property as a common carrier by motor vehicle *in interstate commerce* over the public highways of Montana. (R. 11, commencing at Paragraph C of Answer of Aero to complaint of Board; R. 37, commencing at Paragraph 1 of Exhibit "B" to said Answer; and R. 49, being admission of Board to Paragraph C of said Answer.)

Such "permit," as distinguished from a certificate of public convenience and necessity, was issued by the Montana Board under Section 3847.23, R.C.M. 1935 (originally Section 23 of Chapter 184, Laws 1931) then and now reading as follows:

"Application of act to interstate carriers and motor carriers operating in national parks. The terms and provisions of this act shall apply to commerce with foreign nations, and to commerce among the several states of this Union, insofar as such application may be permitted under the provisions of the constitution of the United States, treaties made thereunder and the acts of Congress; provided that it shall not be necessary for an interstate or international motor carrier, in order to obtain a permit as herein provided, to make any showing of public convenience and necessity, except as to the transportation of passengers and/or freight between points within this state, the power to regulate such operation being specifically reserved herein; and provided further, the board is hereby authorized to exercise any additional power that may from time to time be conferred upon the state by any act of Congress, and provided further, that any motor carrier operating in and about any national park, whose rates and methods of accounting are controlled by contract with the United States, shall not be subject to any regulation by the commission in conflict with such contract or in conflict with any regulation by the United States made pursuant to such contract or made pursuant to an act of Congress of the United States."

At that time Aero was operating and at all times since the effective date of the Federal Motor Carrier Act, approved August 9, 1935. (Title 49, U. S. C. A., Sec. 301, now cited as Part II of the Interstate Commerce Act, February 4, 1887, c. 104, Part II, Sec. 201, as added Aug. 9, 1935, c. 498, 49 Stat. 543) had operated, under Permit No. 2934, issued to it by the Interstate Commerce Commission pursuant to the Federal Motor Carrier Act (R. 8, 37 at Par. 1, admitted by Board, R. 49).

Aero, which had operated its vehicles in interstate commerce over the public highways of Montana since 1935, declined in 1937 and thereafter to pay the vehicle tax and the gross revenue tax. On September 9, 1939, the Board issued an order to show cause why the permit should not be canceled, alleging that the Aero refused to pay the taxes referred to (R. 35-36). Aero made comprehensive answer and return to the Board's order to show cause. In its return, Aero attacked the two taxes as (a) not applicable in statutory terms or intent to its interstate operations, and if found to be applicable, as (b) unconstitutional and void on the same grounds as now asserted (R. 36-45).

After hearing, the Board on October 9th, 1939, revoked the interstate "permit" numbered 1354 which it had issued to Aero on October 3, 1935 (R. 45-46).

On October 13th, 1939, the Board commenced an action in the District Court of Silver Bow County at Butte, Montana, to enjoin Aero from operating motor vehicles upon any public highways in the State of Montana, upon the ground that Aero did not possess "*a franchise, permit or certificate of public convenience and necessity authorizing it to transport property by motor vehicles over or on the public highways of the State of Montana*" (R. 2).

Aero answered by denials, affirmative defense and cross-complaint, setting forth,—

its use of the Montana highways to the extent of the number of vehicles, number of trips per vehicle, empty mileage, loaded mileage and number of days or parts of days traveled by its equipment in Montana, for each — the years 1937, 1938 and 1939. (Par. D of Aero's Answer, R. 13-15);

its payment of (1) Registration and License Plate taxes to the State of Montana for its motor vehicles traveling in Montana, increasing from \$660.50 in 1937 to \$1212.52 in 1938, and in 1939 to \$1630.50 (Par. E, R. 15 and 16), (2) its payment of the 5¢ per gallon tax on gasoline purchased for its motor vehicles in Montana, increasing from \$745.30 in 1937 to \$1257.90 in 1938, and to \$1649.98 in 1939; (Par. E, R. 16 and 17);

and alleged,—

“The total miles traveled by carrier's motor vehicles in interstate commerce in Montana in 1937 and 1938 and for the first ten (10) months of 1939 did not equal the average mileage per year per truck throughout the United States of America for carrier's operations. The total number of days all trucks of carrier were in the State of Montana, traveling loaded or unloaded, averaged a little in excess of one truck per each day of these years; and the empty mileage traveled in the State of Montana in 1937 was 37%, in 1938 was over 42%, and for the first ten months of 1939, 40% of total mileage traveled in Montana against like percentage for the United States of 25%.”

(R. 6-35, and Exhibits attached to Answer at R. 35-46.) The Board filed reply and answer to the cross-complaint, consisting of admissions and denials (R. 49-53). The Board admitted by its answer (R. 49) the allegations contained in Sections A, B and C of the Further and Affirmative Defense and Cross-Complaint of Aero. The allegations in the

Sections admitted by the Board are material and in text are as follows:

A

"The carrier is, and has been since September, 1928, a corporation organized and existing under and pursuant to the laws of the State of Kentucky, with its principal office in the City of Indianapolis, State of Indiana; that it owns and operates a fleet of motor trucks, inclusive of the trucks occasionally within the State of Montana as hereinafter referred to, all of which are licensed under the laws of the State of Indiana, and carry at all times license plates of the State of Indiana; that its business is that of transporting by motor vehicle, in interstate commerce only, over the highways of the United States used household goods and office furniture, incident only to the change of residence of the owner of such goods, under a separate order for such transportation and given in each instance by or on behalf of the owner of said goods; at the rate for such transportation set out in its schedule of rates on file with the Interstate Commerce Commission of the United States. That each shipment is transported under a separate contract therefor, and may be from any point in the United States to any other point in the United States, so long as the point of destination is in a state other than the state within which the shipment originates. That the carrier does not operate its motor trucks, or any of them, on any fixed schedule, or over any regular routes. Shipments of furniture from within the state are transported to and delivered to points within the state, or shipments of furniture originating within the state are transported to points without the state, or shipments of furniture in transit are transported through the state, or motor trucks without load are driven through the state. That carrier never has done and does not now do or carry on and has no intention of carrying on hereafter any intrastate business in the State of Montana and that its operations with respect to the State of Montana have at all times been interstate operations into, out of, across or through said

State. That it has been granted, and now operates under, Permit No. 2934 issued to it by said Interstate Commerce Commission, under and pursuant to the provisions of the Federal Motor Carrier Act of 1935, as a common carrier." (R. 7-8)

B

"That the plaintiff Board of Railroad Commissioners of the State of Montana is an administrative tribunal of the State of Montana, created by an act (Chapter 37, Laws of Montana, 1907, now as amended, Sections 3779-3817 Revised Codes of Montana, 1935) of the Legislative Assembly of Montana, with power to sue in the name of the State of Montana and to be sued in the courts of the United States and of the State of Montana.

"The plaintiffs Paul T. Smith, Horace F. Casey and Austin B. Middleton, are the duly and regularly elected, qualified and acting members of and constitute the said Board of Railroad Commissioners of Montana, established by the act aforesaid.

"The said Board has by the terms of said original act (Sec. 16, Ch. 37, Laws 1907, now Sec. 3797 Revised Codes of Montana, 1935), general supervision of all railroads, express companies, car companies, engaged in the transportation of passengers or property in intrastate commerce within the State of Montana, inclusive of regulation of the intrastate rates and services of such carriers.

"The said Board was by an act (Ch. 52, Laws of Montana, 1913, now as amended; Sections 3879-3913, Revised Codes of Montana, 1935) of the Legislative Assembly of Montana, made ex-officio, the Public Service Commission of the State of Montana, and invested with the power to supervise and regulate the operations of persons, firms, associations or corporations, private or municipal, producing, delivering or furnishing for or to the persons; heat, street-railway service, light, power in any form or by any agency, water for business, manufacturing, household use, or sewerage serv-

ice, telegraph or telephone service, to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village.

"The said Board was by an act (Chapter 63, Laws of Montana, 1913 now as amended, Sections 3859-3878 Revised Codes of Montana, 1935) of the Legislation Assembly of Montana further invested with powers to inspect, regulate and supervise steam vessels, other boats propelled by machinery, sailing craft, ferry boats and barges on the navigable waters of the State of Montana, and house boats, captains and pilots engaged in the carrying of passengers and freight on said waters, and enforce safety regulations applicable to such boats, captains and pilots.

"The said Public Service Commission was by an act of the Legislative Assembly of Montana (Ch. 109, Laws 1927, now as amended, Sections 3913.1-3913.24, Revised Codes of Montana, 1935, invested with power to license all persons, firms and corporations in Montana, engaged in the business of refining, manufacturing, or keeping for sale any gasoline, kerosene distillate, road oil, fuel oil, lubricating oils and greases, inspecting such products, testing the same and enforcing standards of quality and strength with respect thereto.

"The said Board was by an act of the Legislative Assembly of Montana (Ch. 223, Laws of Montana, 1919, now as amended, Sections 3914-3946 Revised Codes of Montana, 1935) made ex-officio, the Montana Trade Commission, with power to fix rules, charges, rates, tolls and maximum profits of public mills as defined in said act, i.e., elevators, mills, factories, milling, manufacturing or producing flour bran, millfeed, or products or commodities of any kind, from wheat, oats, or other grain.

"The said Montana Trade Commission was by an act of the Legislative Assembly of Montana (Ch. 80, Laws of Montana, 1937, not integrated in the Revised Codes of Montana, 1935) made administrator of the 'Unfair Practices Act' of the State of Montana, with power thereunder to prevent unfair competition and discrimination, or sales below cost, among sellers of

merchandise in the State of Montana, in violation of principles, practices and standards prescribed by said act.

"The said Board was by an act of the Legislative Assembly of Montana (Ch. 8, Laws of Montana, Extra Session 1921, now Sections 3848-3858 Revised Codes of Montana, 1935) invested with power to regulate and supervise the operations, services, rates and charges of all persons, firms and corporations owning or operating any pipe line within the State of Montana, for the transportation of crude petroleum to or for the public for hire, or engaged in the business of transporting crude petroleum.

"The said Board was by an act of the Legislative Assembly of Montana (Ch. 184, Laws of Montana, 1931, now as amended; Sections 3847.1-3847.28, Revised Codes of Montana, 1935) vested with power and authority to supervise and regulate every motor carrier in the State of Montana, as in said act defined, viz.,

"The term "motor carrier," when used in this act means every person or corporation, their lessees, trustees, or receivers appointed by any court whatsoever, operating motor vehicles upon any public highway in the state of Montana, for the transportation of persons and/or property for hire, on a commercial basis either as a common carrier or under private contract, agreement, charter, or undertaking; provided that nothing in this act shall be construed as affecting the operation of school busses which are used in conveying school children to and from district or other schools, or to the transportation of freight or passengers by motor vehicles when done occasionally and not as a regular business, or to the transportation of freight or passengers by motor vehicles when done occasionally and not as a regular business, or to the transportation by means of motor vehicles in the regular course of business of employees, supplies and materials by any person, firm or corporation engaged exclusively in the construction or maintenance of highways, or engaged exclusively in logging or mining operations, insofar as the use of

employees, supplies and materials in construction and production is concerned.'

"That none of said acts have been repealed and said Board assumes to and does daily administer each thereof and enforce, and threaten the enforcement of each thereof upon the persons, firms and corporations subject thereto, all of said plaintiff members of said Board daily devoting their time to different duties under said various administrative heads in the multiple areas of official activity assigned and delimited by the Legislative Assembly of the State of Montana to said Board, and using and employing the monies in the Motor Carrier Fund of said Board, hereinafter referred to, for their various official activities under the said multiple administrative heads." (R. 8-11)

C

"That under date of October 3, 1935 the Board of Railroad Commissioners of the State of Montana, assumed to and did issue to this carrier its certificate ~~sometimes~~ styled 'Permit,' No. 1354, for interstate operations only, assuming and pretending to act pursuant to the provisions of said Chapter 184, Session Laws of 1931, of the State of Montana, which 'permit' assumed to grant to this carrier the right to transport property as a common carrier in interstate service by motor vehicles for hire, over and ~~on~~ the public highways of the State of Montana, and which 'permit' remained in full force and effect until the 9th day of October, 1939, on which latter date the said Board assumed and pretended to issue an order, purporting to cancel and terminate said certificate, or 'permit.' That the 'permit' so issued by the Board related to that class known as 'Class C Motor Carriers' as defined in said Chapter 184 of the Session Laws of 1931.

"That under date of September 19, 1939, the Board of Railroad Commissioners of the State of Montana assumed to and did issue an order directing the carrier herein to appear before it on October 6, 1939, to show

cause, if any, why any right or rights, permit or permits granted it by said Board to operate as a Motor Carrier over the public highways of the State of Montana should not be revoked and cancelled, a copy of said order to show cause, marked Exhibit 'A,' being attached hereto, and by reference, made a part hereof the same as if fully written out herein.

"That on October 6, 1939, this carrier appeared before said Board and filed its written return to said order to show cause, a copy of said return, marked Exhibit 'B,' being attached hereto and by reference made a part hereof the same as if fully written out herein; and then and there at the hearing thereon, there was offered by this carrier and received in evidence sworn credible and substantial testimony in support of said return, and no other evidence was offered by any person or interest, or received at said hearing by said Board.

"That under date of October 9, 1939, the Board issued an order purporting and pretending to cancel and terminate carrier's 'permit' issued as aforesaid, a copy of said purported order of cancellation and termination, marked Exhibit 'C,' being attached hereto and by reference made a part hereof the same as if fully written out herein and therewith advised carrier that any attempt on its part to operate its vehicles over the highways of Montana in the interstate commerce aforesaid, would result in seizure, impoundment and confiscation of its trucks, arrest and trial of its drivers whenever and wherever any of said trucks with drivers were found on the highways of Montana, and the repeated attempt by said Board at infliction of fines and penalties for each and every daily movement of trucks and drivers. Upon receipt of notice of such purported order of termination and cancellation of its permit in Montana, carrier to avoid the seizure and impoundment of its trucks, delays, detentions and conversions of loads in transit, fines and penalties provided in said Chapter 184, Laws 1931, ceased its operations in interstate commerce into, out of or across the said State of

Montana, except with respect to three of its trucks which at the time of receipt of said order were then already in, or nearing, the State of Montana, and which trucks completed the shipments then in actual transit. Since the completion of said shipments so in transit at said time, the carrier did not operate, or attempt to operate any of its trucks or equipment in interstate commerce into, out of or across the said State of Montana, until subsequent to December 5, 1939, as hereafter appears. That this carrier thereupon commenced the preparation of litigation in its behalf, when it was served on or about October 15th, 1939, with the thirty day temporary restraining order herein in this action commenced by the Board on October 13, 1939. That on the date of the issuance of the temporary restraining order in this case, to-wit, on October 13, 1939, as aforesaid this carrier was not operating any of its trucks or equipment into, out of or across the said state of Montana or within the boundaries of the state of Montana and it did not operate of such trucks or equipment within the boundaries of the state of Montana following the issuance of the restraining order herein, until sometime subsequent to December 5, 1939, following dissolution of said restraining order by the above entitled court after hearing upon application of this carrier, said order of dissolution being conditioned on delivery of \$5000.00 bond by this carrier as appears in the files herein, for the protection of the tax demands of said Board." (R. 11-13)

The law issues framed by the Board's denials of Sections "G" through "M" of Aero's cross-complaint (R., pp. 21-34 for cross-complaint and R., pp. 50-53 for Board's denials) may be concisely stated, as respects each tax.

Law Issues as to "Flat" \$10.00 Per Vehicle Tax

(Sections 3847.16-3847.18 Revised Codes, Montana, 1935)

(1) That the vehicle tax is, in terms, applicable only to intrastate operations, i.e., holders of a certificate of public convenience and necessity and not to holders of an interstate "permit" (Section "G" of Cross-Complaint of Aero at end of Section, R. 23 and Par. VI of Board's Answer, R. 50-51).

(2) That the vehicle tax, professedly laid "in consideration of the use of the public highways of this state" (Section 3847.16 (a)) is by a subsequent section of the statute (3847.17) used for "the purpose of defraying the expenses of administration of this act and the regulation of the businesses described in this Act" (Section "G" of Cross-complaint of Aero, R. 22 and Par. III of Board's Answer, R. 50-51).

(3) That if the vehicle tax is by its terms construed to apply to interstate operations,—

it violates the equal protection clause of the 14th Amendment, in that it is exacted without regard for the essential differences between Aero's infrequent use of Montana's highway facilities as opposed to constant use by other truckers;

it violates the commerce clause of the Federal Constitution and the due process clause of the 14th Amendment in that it is an attempt by the State to lay a tax on the privilege of engaging in interstate commerce, indiscriminately covers interstate and intrastate commerce, without apportionment on any basis, is not capable of separation, bears no relationship to the use of the highways, and is exorbitant and excessive as a policing charge (Section H of Board's Cross-Complaint, R. 23-28 and Paragraph VII of Board's Answer, R. 51).

Law Issues as to Gross Revenue Tax

(Sections 3847.27 and 3847.28 Revised Codes, Montana, 1935)

(1) The gross revenue tax is, in terms, applicable only to intrastate operations in that it is laid on holders of a certificate of public convenience and necessity and not upon an interstate operator who is exempted from the duty of obtaining such a certificate (Sec. 3847.23, Revised Codes of Montana, 1935). (Section "J" of Cross-Complaint of Aero, R. 29 and Par. IX of Board's Answer, R. 52.)

(2) That if the tax is by its terms construed to apply to interstate operations, it violates the Commerce Clause of the Constitution of the United States, and the due process of law clause of the 14th Amendment, in that,

it is an attempt to collect a tax for the privilege of engaging in interstate commerce, since the carrier has no revenues except such as are derived from interstate commerce;

in that it is indiscriminately applied to both intrastate and interstate business without regard for the substantial distinctions between the two types of business, and Aero's exclusive interstate operations;

in that the tax is laid without apportionment, or basis of apportionment, so as to exclude from its gross effect the right of Aero to engage exclusively in interstate commerce on conditions permitted to the state;

in that the tax is not, in truth, exacted as compensation for the use of the highways, bears no relation to the use of the highways;

in that no part of the proceeds of the tax are used or usable for the construction, improvement, repair or maintenance of any of the highways of Montana;

in that the tax revenues are not allocated for regulation and policing of interstate traffic but are appropriated for "carrying out all the duties of the railroad and public service commission" (Montana Session Laws, 1939, pp. 662 and 665); and,

in that the \$15.00 per truck minimum fee as part of the gross revenue scheme is a direct burden on Aero's exclusive interstate commerce (section K of Aero's Cross-complaint, at R. 29-32, and Par. X of Board's Answer, at R. 52).

In Paragraph X of its Answer, the Board attempted to justify the application of the gross revenue tax, in this language:

"Deny each and every allegation, matter and thing contained in Section K thereof, except admit the provisions of Section 17 of Chapter 184, Laws 1931, and admit the appropriation made by the legislative assembly of the State of Montana, but allege that said Chapter 184, Laws 1931, properly and correctly construed does not require the payment of a gross revenue upon all of the interstate revenue or commerce of the defendant and cross-complainant, but requires payment only of that portion of the revenue or commerce of said company carried on within the State of Montana; that ever since the enactment of said Chapter 184 the plaintiffs and cross-defendants and their predecessors in office have continuously and consistently construed the same in this manner, which construction has not heretofore been challenged by anyone or repudiated by the courts in Montana; and that at no time have the plaintiffs and cross-defendants demanded or required of defendant and cross-complainant that it pay a gross revenue fee upon all of its interstate commerce or more than upon that portion of such revenue or commerce of said company carried on within the State of Montana." (R. 52)

Aero moved to strike the attempted justification upon the grounds:

"(a) the construction attempted to be placed on the provisions of Chapter 184, Laws 1931, by said allegations contradicts the terms of said Chapter (b) the validity of the Chapter is to be determined by what may be done under its terms, and not by what the Board actually does in administration of the Chapter (c) the attempted construction represents and is an attempt by the Board to amend the statute to save it from manifest invalidity, by additions and qualifications within the legislative province only and (4) in that the minimum tax of \$15.00 exceeds the $\frac{1}{2}$ of 1% tax on gross revenues of Defendant arising from any segregation or pro-ration of interest revenues accruing from interstate operations involving Montana."

III

Law Issues as to Both Taxes

The carrier alleged that both of said acts assuming to prescribe respectively (a) the Ten Dollar per vehicle "flat" or "straight" fee and (b) the 1 and $\frac{1}{2}$ % Gross Operating Revenue fee with a "flat" or "straight" per vehicle minimum, purport to declare that said exactions are levied "in consideration of the use of the highways in the state." That said declarations are of no force or effect, and gratuitous in character in that the further, express terms of both of said acts show upon the face thereof, that said exactions are for the purpose of securing revenues to carry on the whole motor vehicle administration of said Board in all phases and incidents. That, in addition, the Legislative Assembly of Montana has expressly appropriated all of the receipts from said exactions for "carrying out all the duties of the railroad and public service commission" in the multiple fields of administrative activity authorized by the Legisla-

tive Assembly, viz., in brief statement, regulation of railroads, steam and electric, express companies, sleeping car companies, freight line companies, all public utilities of every nature, in Montana, private or municipal, flour mills, grain elevators, boats and pilots on navigable waters, oil pipe lines, producers, refiners and distributors of gasoline, fuel oil, lubricating oil, etc., merchants and sellers of commodities under the Unfair Practices Act, etc., etc. (R. 32-33)

That the roads and highways, and facilities thereof, furnished to the public by the State of Montana are, as to the State Highway System (commonly known as the "Federal Aid Highway System") used by carrier constructed by the United States of America and the State of Montana, the United States bearing 55% of the *cost of construction* and the State bearing 45% of the *cost of construction*. That with respect to the *maintenance* of the State Highway System, and the *construction and maintenance* of all other roads and highways in Montana, the cost thereof is provided by the State of Montana. That in all cases the funds provided by the State of Montana are derived entirely from the Motor License and Registration Tax and the Gasoline License Tax (referred to in Section "E" of Aero's Cross-complaint, R. 15-18) and alleged that carrier pays and discharges all of said license tax exactions for which it is liable and notwithstanding its occasional and intermittent use of the State Highway System (and no other State's Roads or highways) as aforesaid. (R. 33)

The Board answered the foregoing allegations by admitting that the two acts declare the tax is laid "in consideration of the use of the highways," admitting the State of Montana pays 45 per cent of the cost of construction of the state highway system, and otherwise denying the allegations. (Section L of Aero's Cross-complaint at R. 32-33 and Par. XI of Board's Answer at R. 53.)

Upon the foregoing issues of law and fact the action was tried by the District Court of the Second Judicial District of the State of Montana, at Butte, on November 2, 1943, before Hon. Jeremiah J. Lynch, District Judge, sitting without a jury (R. 56). The evidence is brief (R. 58-70) and may be conveniently summarized as follows:

E. S. Wheating, Vice-President and General Manager of Aero Mayflower Transit Company, stated that the company, a Kentucky corporation (R. 57), is engaged in business as "interstate motor carriers of household goods"; that it does no intrastate business in Montana; none of its revenues arise from intrastate business in Montana, or from intrastate operations in any state. The company is the holder of Certificate No. 2934, issued by the Interstate Commerce Commission under which it operates between all 48 states. Its operation consists of the movement of "household goods and office furniture and fixtures, and store equipment and fixtures from any point in the United States to any other point in the United States, as long as it is from one state to another." (R. 59)

Prior to the commencement of the action on trial, the company held a Permit (No. 1354) from the Board for operation through the state. (R. 59-60)

Wheating testified that Aero paid for Montana License plate fees in the years 1939-1942, as follows:

Year	1939	1940	1941	1942
Amount	\$1535.00	\$1250.25	\$1330.75	\$1195.75

(R. 60).

He further testified that Aero paid for gasoline purchased in Montana for use of its trucks, as follows:

Year	1939	1940	1941	1942
Amount	\$553.85	\$546.10	\$838.50	\$681.80

(R. 60-61)

The per mile cost in Montana for these expenditures was, about $2\frac{1}{3}$ to $2\frac{1}{2}$ cents per mile, against an average throughout the United States of less than 1 cent for each mile traveled. (R. 61)

Testifying with respect to the claim of the Board that, in any event, it could lawfully collect the minimum fee of \$15.00 under the gross revenue tax (Section 3847.27, Revised Codes of Montana, 1935) Wheating testified, without objection, that gross revenue based on the Montana load factor for miles traveled in Montana, and using an average income per mile would have been as follows:

Year	1939	1940	1941	1942
Gross Revenue	\$11,961.00	\$11,450.00	\$17,761.00	\$16,160.50
with resulting taxes				
$\frac{1}{2}$ of 1% gross revenue	\$59.80	\$55.23	\$88.80	\$80.80
\$15.00 per vehicle minimum	\$660.00	\$630.00	\$870.00	\$1,035.00

(R. 62)

Wheating testified that the figures with reference to equipment using Montana highways in the years 1937, 1938 and 1939, as set forth in Section D of Aero's Answer and Cross-Complaint (R. 13-15) were true and correct (R. 62).

On cross-examination, Wheating testified, over objection, that the Board had not made demand for payment of $\frac{1}{2}$ of 1% on the entire gross revenue of the company (R. 63-64).

Enor K. Matson, Secretary and counsel of the Board, testified at the call of Aero, that the Board has demanded two taxes from Aero, first, the \$10.00 per vehicle tax (Section 3847.16) and the \$15.00 per vehicle tax stated as the minimum tax under the gross revenue statute (Sec. 3847.27). The Board has always demanded the \$15.00 per

vehicle tax, being the minimum demand under the gross revenue tax (R. 67), but would accept $\frac{1}{2}$ of 1% of gross revenues in Montana if the tax receipts on such basis were more than the minimum fee (R. 67, 68).

Paul T. Smith, a member of the Board, corroborated the testimony of Enor K. Matson, Secretary-Counsel, and stated that the Board has not attempted to collect from defendant "the gross revenue fee of $\frac{1}{2}$ of 1% based upon the total revenue of the defendant in all its operations throughout the state." (R. 69)

After the trial the Board tendered proposed findings of fact and conclusions of law (R. 70-73) and Aero did likewise (R. 73-95). The trial court prepared and filed its own findings of fact and conclusions of law (R. 95-97) wherein it determined:

"Findings of Fact

"1. That the plaintiffs, Paul T. Smith, Leonard C. Young and Horace F. Casey are now and for several months past have been the duly elected, qualified and acting members of the board of railroad commissioners of the State of Montana.

"2. That the defendant is now and ever since September, 1928, has been a corporation duly organized and existing under and by virtue of the laws of the State of Kentucky. (R. 95)

"3. That in the years 1937, 1938, and 1939 the defendant owned and maintained a fleet of motor trucks which were used by it in transporting for valuable considerations household goods and office furniture, in interstate commerce exclusively, over and upon the highways of the United States; that during said years it so operated under a permit issued to it by the Interstate Commerce Commission of the United States.

"4. That in the year 1937 the defendant operated twenty-five motor vehicles over and upon the public highways of the State of Montana in the conduct of

its said business; that in the year 1938 the defendant operated forty motor vehicles over and upon the public highways of the State of Montana in the conduct of its said business, and that in the year 1939 the defendant operated forty-four motor vehicles over and upon the public highways of the State of Montana in the conduct of its said business.

"5. That the defendant has refused to pay to said Board of railroad commissioners for the said years 1937, 1938 and 1939 the fees prescribed by Section 3847.16, Revised Codes of Montana, 1935, for the reason as it contends that as to it the said section is invalid; that the defendant likewise has refused to pay to said board for the said years 1937, 1938 and 1939 the annual fees prescribed by Section 3847.27, Revised Codes of Montana 1935, for the reason as it contends that as to it the said section is invalid. (R. 95-96).

2. Conclusions of Law

"From the foregoing findings of fact the court draws the following conclusions of law, to-wit:

"1. That section 3847.16 Revised Codes of Montana, 1935, is a valid exercise of legislative authority and should be obeyed.

"2. That section 3847.27 Revised Codes of Montana, 1935, as applied to the defendant is invalid for the reason that it fails to specify any method by which the gross operating revenue of the defendant in the state of Montana for any year may be determined, and for the further reason that the Public Service Commission of the state of Montana mentioned as the administrative body in section 3847.26, 3847.27 and 3847.28, Revised Codes of Montana 1935, has nothing to do with the regulation and supervision of motor carriers using the public highways of the State of Montana.

"3. That the defendant should be restrained and enjoined from operating its motor vehicles over and upon the public highways of the state of Montana until it

has paid the said board of railroad commissioners the sum of two hundred fifty dollars as annual fees for the year 1937, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1938, until paid; the sum of four hundred dollars as annual fees for the year 1938, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1939, until paid; and the sum of four hundred and forty dollars as annual fees for the year 1939, with interest thereon at the rate of six per cent per annum from the 1st day of January, 1940, until paid." (R. 96-97).

Judgment was entered (R. 97-98) whereby Aero was "restrained and enjoined from operating its motor vehicles over and upon the public highways of the State of Montana until it paid" the \$10.00 per vehicle tax for 1937, 1938 and 1939 demanded by the Board (R. 97-98).

The Board appealed to the Supreme Court of Montana from that part of the judgment holding the gross revenue tax invalid and unconstitutional (R. 99). Aero appealed to the Supreme Court of Montana from that part of the judgment holding the \$10.00 per vehicle tax valid (R. 99-100).

Upon the appeal the Supreme Court of Montana affirmed the validity of both kinds of taxes (R. 119) and Aero is now under injunction (except for supersedeas) restraining and enjoining it from operating its motor vehicles in interstate commerce over and upon the public highways of the State of Montana until it pays all taxes claimed by the Board to be due, or hereafter to become due (R. 154-157).

Specification to the Assigned Errors to Be Urged

A

As respects the "flat" or "straight" \$10.00 per vehicle annual tax imposed by sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935:

I

The Supreme Court of the State of Montana erred in holding that the tax assailed is not in violation of the commerce clause of, and also, the due process clause of the Fourteenth Amendment to, the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until the tax is paid.

II

The Supreme Court of the State of Montana erred in holding that the tax assailed is not in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until the tax is paid.

III

The Supreme Court of the State of Montana erred in gratuitously reading into section 3847.16, Revised Codes, Montana, 1935, and its related section 3847.17, the assumption that the tax was exacted to build, maintain and supervise the highways of Montana and using that assumption to justify the exaction against petitioner, engaged exclusively in interstate commerce, when the said statutes expressly negative any such purpose.

IV

The Supreme Court of Montana erred in sustaining the "flat" or "straight" \$10.00 per vehicle tax as a direct burden on interstate commerce, and prohibiting petitioner from operating exclusively in interstate commerce unless such tax is paid, since the tax on its face bears no relation whatever to the use of the public highways of the State of Montana by petitioner.

V

The Supreme Court of Montana erred in sustaining the "flat" or "straight" \$10.00 per vehicle tax, the proceeds of which, by the words of section 3847.17, Revised Codes of Montana, 1935, "shall be available for the purpose of defraying the expenses of the administration" of the Montana Motor Act "and the regulation of the businesses herein described," as against petitioner, who operates in interstate commerce only, since the tax on its face bears no relation to the asserted uses or purposes of its levy.

VI

The Supreme Court of Montana erred in sustaining the "flat" or "straight" \$10.00 per vehicle tax as compensation for the use of the highways of Montana, when the tax is by its terms and necessary effect, and despite its self-serving pretensions, is a direct state tax levied for the privilege of carrying on interstate commerce over the public highways of Montana.

VII

The Supreme Court of Montana erred in applying the "flat" or "straight" tax of \$10.00 per vehicle against petitioner's exclusive interstate operations, since the tax on its face is not in any manner related to or apportioned to, such operation.

VIII

The Supreme Court of Montana erred in mis-reading and in mis-applying to the Montana statutes in question, sections 3847.16, 3847.17 and 3847.18, Revised Codes of Montana, 1935, the decisions of the Supreme Court of the United States in,

Clark v. Poor, 274 U. S. 554, 47 Sup. Ct. 702, 71 Law Ed. 1199;

Interstate Transit, Incorporated v. Lindsey, 283 U. S. 183, 51 Sup. Ct. 380, 75 Law Ed. 953; and

South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177, 58 Sup. Ct. 510, 82 Law Ed. 734.

IX

The Supreme Court of Montana erred in holding that sections 3847.16, 3847.17 and 3847.18 are applicable to interstate commerce, or petitioner's exclusive interstate operations at all.

B

As respects the Quarterly Gross Revenue tax on the interstate carriers' gross revenues, imposed by sections 3847.27 and 3847.28, Revised Codes of Montana, 1935:

I

The Supreme Court of Montana erred in holding that the quarterly gross revenue tax assailed is not in violation of the commerce clause of, and, also of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until such tax is paid.

II

The Supreme Court of Montana erred in holding that the quarterly gross revenue tax assailed is not in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and in prohibiting petitioner from operating in interstate commerce until tax is paid.

III

The Supreme Court of Montana erred in holding that the State of Montana has power, as a condition of permitting petitioner to engage in interstate commerce over the public highways, to impose a tax upon petitioner who operated over its public highways exclusively in interstate commerce, based upon gross receipts to petitioner derived solely from interstate commerce, absent any attempt by the legislature at apportionment, a method, formula or device, for apportionment.

IV

The Supreme Court of Montana erred (a) in gratuitously assuming, in the face of section 3847.27, Revised Codes, Montana, 1935, stating that the tax is imposed on the gross operating revenue of the carrier, that the tax is imposed only on "gross revenue derived from operations in Montana," however determined, and (b) in itself endeavoring to invent or supply a taxable base of gross revenues as between Montana and the national area outside Montana, when the statute refers to "the gross operating revenue of the carrier," i.e., this petitioner's total interstate revenues, as the taxable base.

V

The Supreme Court of Montana erred in holding that the State of Montana has power to levy a tax on the inter-

state revenues of a carrier engaged exclusively in interstate commerce, as a condition of that carrier operating over the highways of Montana, when the legislative assembly has utterly failed to provide, any method whatever of relating the tax to the use, and permits a Board or unidentified persons to invent any method of apportionment in any single instance.

VI

The Supreme Court of Montana erred in gratuitously assuming, as a premise to its conclusion upholding the gross revenue tax that there are gross revenues derived by petitioner "from operations in Montana" to which the tax could be made to apply, in the face of the fact as found by said court, that petitioner operates exclusively in interstate commerce, and derives its revenues solely from that commerce, and, on such gratuitous assumption, prohibiting petitioner from operating in interstate commerce.

VII

The Supreme Court of Montana erred in upholding the validity of the gross revenue tax against the challenge of the constitutional objections made by petitioner when the Act utterly fails to provide, or to suggest, any method of apportionment between "gross revenue derived from operations in Montana" and gross revenue elsewhere.

VIII

The Supreme Court of Montana erred in its attempt to immunize the statute against the constitutional objections, in that, under the guise of statutory construction, it assumed to legislate into the statute a restriction confining the operation of the gross revenue tax to "gross revenue derived from operations in Montana," when the legislative assembly by the words of the statute applied the tax to "the gross operat-

ing revenue of the carrier," and the Supreme Court of the United States can not be bound by any such perversion of language.

LX

The Supreme Court of Montana erred in that, after assuming to legislate into the statute a restriction confining the operation of the tax to "gross revenue derived from operations in Montana," it found no method provided in the statute for ascertaining such alleged Montana revenues, i.e., by road mileage traveled in the state, number of vehicles, road hours, cargo, volume of traffic, ton miles, vehicle miles, or any other factor or combination of factors, and yet enjoined petitioner from operating exclusively in interstate commerce until it paid a tax which could not be ascertained, except by guesswork by some unidentified agency.

X

The Supreme Court erred in that it finally concluded that the \$15.00 minimum per vehicle annual tax imposed by the gross revenue statute could be put into effect "even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is (opinion apparently omits language here) not provided," thus making such tax an arbitrary minimum charge for the naked privilege of engaging in interstate commerce, in violation of the commerce clause and the Fourteenth Amendment to the Constitution of the United States.

XI

The Supreme Court of Montana erred in holding that petitioner, engaged exclusively in interstate commerce, may be subjected to a percentage tax on gross revenues, as a condition of using the public highways of Montana in interstate commerce, when no formula, guide, standard or meas-

ure of tax is stated by the statute, or when no agency of the State is delegated authority, under legislative safeguards, to compute such tax on stated or ascertainable factors.

XII

The Supreme Court of Montana erred in construing sections 3847.27 and 3847.28, Revised Codes of Montana, 1935, to be applicable to interstate commerce, at all.

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ARGUMENT

Rationale and Effect of State Court Decision

I. The Obtrusive Internal Errors in the State Court's Opinion Deprive it of Force

Since this Court is called upon to review the decision of the highest Court of the State of Montana, the precise premise, the rationale, and the particular effect of the State Court's decision must be ascertained. And the presence of manifest, palpable and repeated errors in an opinion at least suggests that the subject matter did not receive that painstaking examination which it requires, in the area of State's rights and interstate commerce.

In the majority opinion, written by Mr. Justice Morris, it is said:

"There is no dispute as to the facts . . ." (R. 104) and, immediately following that statement, the author says:

"The Company is engaged in the motor transportation of used or second hand household goods and office furniture from one state to another for hire. It does not transport any goods of any nature or kind from one point to another in the same state. The only transportation it engages in, in so far as it concerns this state, is the transportation of goods from another state to some point in this state, or it passes through this state to a destination in some third state." (R. 104)

This language seems entirely sufficient to warrant the conclusion that the Montana Court agrees that the carrier is engaged, exclusively, in interstate commerce. Since that activity is a privilege granted and protected by the Federal Constitution, (*Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23; *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 56-58; *Freeman v. Hewit*, No. 3, October Term, 1946, — U. S. —) it follows that the authority of the State must be

exercised within the area open to State action. And, undoubtedly, the State may, within permissible limits, impose taxes on those who pursue the privilege, even though such action affects interstate commerce, the limits being determined, in the last analysis, by the Congress, or by this Court. While interstate commerce must pay its way, the State may not exact a charge which in every day practice bars the way, or hampers movement along the way.

(1) *Erroneous premise of opinion:*

The authority of the majority opinion of the Supreme Court of Montana, in seeking a basis for the State's direct exactions on interstate commerce stated in the first paragraph of the opinion:

"This controversy involves the question as to what extent a state may impose burdens in the way of licenses and taxes upon motor carriers engaged in interstate commerce for operating their vehicles over the highways of the state. Such exactions are imposed upon the presumption that the state owns the highways within its borders, and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways." (R. 103)

Passing over the fact that the carrier here is engaged solely in interstate commerce, as stated in the opinion, above, the statement that the taxes are exacted as compensation for the use of the highways,

"and the revenue derived therefrom shall be expended to build, maintain and supervise such highways,"

is not correct.

Sections 3847.16, 3847.17 and 3847.27 covering both the \$10.00 flat per vehicle tax and the $\frac{1}{2}$ of 1 per cent gross

revenue tax, place the tax revenues in the motor carrier fund which

"shall be available for the purpose of defraying the expenses of administration of this Act (the Motor Carrier Act) and the regulation of the businesses herein described." (Section 3847.17)

Not one cent goes to build any Montana highway.

Not one cent goes to maintain any Montana highway.

Not one cent goes to supervise any Montana highway.

Such erroneous statements are the very foundation—the continuing rationale—of the opinion, for thereafter they are twice repeated in the opinion, and were left unchanged after the petition for rehearing pointed out their erroneous character (R. 126-127).

In dealing with the flat vehicle tax, the opinion of the Montana Court (R. 112) again states:

"The foregoing authorities clearly establish the right of the state to impose upon motor carriers engaged in interstate commerce exactions by way of taxes and license for use by such motor carriers of the state highways when such exactions are necessary to build, maintain, and supervise the highways. In addition the exactions must be such as are reasonably necessary for the purposes mentioned, and must not be discriminatory as between state and interstate carriers."

The author of the opinion then proceeds to say that the taxes exacted by Montana are, in fact, used for such purposes.

In the next to the last paragraph of the opinion, page 21, (R. 118) it is said:

"In the case at bar Montana owns the highways over which the company operates its vehicles and the taxes imposed are for the use of the state highways. The revenue collected is devoted to the building, repairing

and policing of such highways, and that which the state furnishes is an aid, not a burden to interstate commerce."

The Board of Railroad Commissioners in this case did not make any contention in the trial court or in the Supreme Court of Montana that the revenues from these license taxes were to be used for *building, maintaining or supervising highways*. The Board could not do so, and claim the fees. State Highways in Montana, including all Federal Aid Highways, are constructed, maintained and supervised by the State Highway Commission (Sections 1783-1800, R. C. M. 1935, as amended by Ch. 86, Laws 1945 and Section 2396.2 R. C. M. 1935. Traffic on such highways is supervised by the Commission through the Montana Highway Patrol (Sections 1741.2-1741.12, R. C. M. 1935, as amended). County highways may be constructed and are under the supervision of the Board of County Commissioners in each county (Sections 4465.3, 4486.1 and 4486.2, R. C. M., 1935, to the exclusion of respondent Board. The revenue is for "*the expenses of administration of this Act (Motor Carrier Act) and the regulation of the businesses herein described,*" (Sec. 3847.17 and Sec. 3847.28, Revised Codes, Montana, 1935), *a far different purpose than highway building, repair and supervision*. The Board had in fact admitted that revenues for building, maintaining and supervising the highways in Montana arise from the Registration and License Plates tax and the gallonage tax on gasoline (Sec. E of Aero's Cross-Complaint (R. 15) and Pars. III and IV of Board's Answer (R. 49-50). Before Aero can operate any vehicle over any highway in Montana, it must pay the Registration and License Plate fee (Sections 1759, 1759.7, 1760, 1760.1-1760.7, and before registration may be completed and license plates issued, Aero must pay all applicable *ad valorem* taxes on each vehicle

(Ch. 72, Laws of Montana, 1937, as amended by Ch. 154, Laws of Montana, 1943).

Thus, it is seen that the opinion begins and concludes on the erroneous statement that the revenues from these taxes are for highway building, repair and supervision. The attention of the Court was called to the fact that revenues for highway building, repair and supervision come only from gasoline license taxes in Montana collected by the State Board of Equalization and administered by the Montana Highway Commission, and that the Board of Railroad Commissioners has nothing to do with such exactions. (Petition for Rehearing, R. 126-129) The Court had, in effect, said the same thing when it noted the statutes which are the sources of highway revenues (R. foot of p. 104 and 105).

The idea that these revenues attempted to be exacted from Aero are for highway construction, maintenance, repair and supervision, is so firmly fixed in the court's minds, apparently, that the opinion cites *Interstate Transit v. Lindsey*, 283 U. S. 75 L. Ed. 953, in support of its reasoning. But in that case, Mr. Justice Brandeis, writing the opinion for the United States Supreme Court, *invalidated a Tennessee statute for the very reason that the tax "was not,"* in the court's words, "exacted for such purposes," i.e., construction or maintenance of highways or bridges, "but merely as a privilege tax on the carrying on of interstate business." The Justice pointed out that in Tennessee, as in Montana, the revenues for highways came from other taxes. The *Lindsey* case is a plain, unassailable authority for Judge Lynch's decision in the lower Court. And yet the opinion in this case (R. 107-110) uses it as authority to bolster the erroneous assumption that the Montana taxes

are dedicated to building, maintaining and supervising highways in Montana.

Whether a majority of the Montana Supreme Court would have reached a different result on a more careful reading of the record, and upon full consideration of the meaning of *Interstate Transit v. Lindsey*, is an interesting speculation. The dissenting Justice infers that the problem of maintaining the highways of Montana led the majority to "judicial edict." He said:

"The majority opinion is based upon and attempted to be supported by the fallacious premise that the exactions in question 'are imposed upon the presumption that the state owns the highways within its borders, and the exactions are imposed as compensation for their use, and the revenue derived therefrom shall be expended to build, maintain and supervise such highways.' I can find no support for any such presumption. I fully appreciate the problem of maintaining our highways, and the necessity of exacting a fair compensation for their use by foreign-owned trucks, but I cannot, as a matter of expediency, lend my support to the exaction of such compensation by judicial edict." (R. 119-120)

And again:

"I think there can be no question but that the state has power, by appropriate legislation, to require compensation for the use of its highways by vehicles engaged in interstate commerce. I further think that such legislation must emanate from the legislative arm of the state government. This court may, perhaps, point out that the state is overlooking a possible source of revenue for the maintenance of its highways, but may not enact the legislation for the purpose of its collection, under the guise of judicial interpretation." (R. 123)

(2) *Failure to find apportionment formula:*

There are other errors in the majority opinion of the Montana Court which vitiate its rationale. At R. 115 the opinion states:

"By reading sections 3847.27 and 3847.16 together, which the rule on statutory construction enjoins, *State v. Bowker*, 63 Mont. 1, 205 Pac. 961, it becomes clear that the clause in section 3847.27 imposing upon the company a tax of one-half of one per cent based upon its 'gross operating revenue' that in the use of this phrase by the legislature the gross revenue derived from operations in Montana was intended and not the company's gross revenue from all sources. No other reasonable intention is conveyed by paragraph (b) of section 3847.16 which is as follows:

"When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state.'"
(R. 115)

At R. 115, the opinion continues:

"It was said in *United States v. Freeman*, 3 Howard 565, (44 U. S. 548), 'A thing which is within the intention of the makers of the statute, is as much within the statute as if it were in the letter.' Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention to which we do not agree, no difficulty would arise in putting into effect the minimum

fee of \$15.00 required for each company vehicle operated within the state."

In its anxiety to supply a method or formula for apportioning revenues to Montana, the court grasps at a phrase in paragraph (b) of Section 3847.16, providing for the flat vehicle tax, which requires motor carriers in their annual or special reports to show "the total business performed within the limits of this state." This phrase is equally meaningless, when applied to interstate commerce (if it does apply to that commerce) for no business is executed and completed in Montana by this interstate carrier in the sense of full performance within the limits of Montana, no method of separating revenues is set forth, and "business" is an aggregate term totaling many activities and incidents other than revenues. The phrase "show the total business performed within the limits of this state," appears in the \$10.00 per vehicle tax statute (Sec. 3847.16) enacted in 1931 (Sec. 16 of Ch. 184, Laws of Montana, 1931) some four years before the $\frac{1}{2}$ of 1% gross revenue statute was enacted in 1935 (Sec. 2 and 3 of Ch. 100, Laws 1935). The Montana court would construe the statutes "together", i.e., supply the missing apportionment formula for the gross revenue tax, the later enactment, out of the quoted language in the vehicle tax statute, the antecedent enactment. But the later gross revenue tax statute expressly directs the carrier to "*file with the public service commission, a statement showing the gross operating revenue of such carrier.*" Hence, even if the quoted phrase from the earlier act could be tortured into a statement of a method or formula for apportionment, it must fall under the later legislative direction to report "*the gross operating revenue of such carrier.*" The later statute carries its own directions as to reporting. *Of course the fact is that the phrase furnishes no method of apportionment whatever.*

The opinion of the Montana court in effect recognizes that there is no thought of apportionment and no method for realizing it when it finally says,

"It was said in *United States v. Freeman*, 3 Howard 565 (44 U. S. 548) 'A thing which is within the intentions of the makers of the statute, is as much within the statute as if it were in the letter.' *Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, a contention to which we do not agree, no difficulty would arise in putting into effect the minimum fee of \$15.00 required for each company vehicle operated within the state.*"

It seems to us that a complete answer to this kind of "construction" is as follows:

The commerce clause forbids discrimination, whether outright or ingenious.

Welton v. Missouri, 91 U. S. 275, 282-283;

Guy v. Baltimore, 100 U. S. 434;

Webber v. Virginia, 103 U. S. 344;

Hale v. Binco Trading Co., 306 U. S. 375.

(3) *Confusion in opinion respecting the minimum fee under the gross revenue tax.*

A further obtrusive error in the opinion stems from the State court's confusion respecting the \$15.00 minimum. The opinion says as to it, "... no difficulty would arise in putting into effect the minimum fee of \$15.00 required for each company vehicle operated within the state" (R. 115, at foot of page). This fee is part of the tax on "gross operating revenue" of the carrier. *It depends upon the presence of some operating revenue*, a mill, a cent, a dollar, or more,—any amount of gross revenue less than the

amount which on the basis of $\frac{1}{2}$ of 1% will yield a total of \$15.00 in a year. The legislative command, in effect, is:

“Pay $\frac{1}{2}$ of 1% of gross revenue earned each quarter of the year, but not less than \$15.00 per annum for each vehicle operated by the carrier under the act during that period.”

Unless the carrier earns some revenue the Board is not entitled to tax on a vehicle basis at all, for the vehicle tax may be invoked only as a minimum, i.e., *the smallest amount payable under the gross revenue tax. It is the tail that goes with the hide of gross revenue.* It is not a vehicle tax as such. That kind of a tax has already been imposed under the \$10.00 per vehicle tax prescribed by Section 3847.16. The necessity for some proper apportionment of the carrier's gross interstate revenues does not disappear because the gross will yield less than \$15.00 per annum. The minimum, calculated on a vehicle basis, can be paid only by a contribution from gross interstate revenues; the carrier has no other revenues. The revenues remain gross revenues; the revenues remain interstate revenues; the vehicles remain interstate vehicles, and the carrier continues to be enjoined from carrying on interstate commerce across Montana, or some part of it, when Montana will not take the pains to levy a tax based on its relation to that commerce. Whether the carrier operates one vehicle across Montana, or some part of it in a year at a tax of \$15.00, or two hundred vehicles, at a tax of \$3000.00, is immaterial; apportionment continues absent.

In its effort to escape the consequences of non-apportionment by the legislature, the Court treats the \$15.00 per vehicle minimum under the gross revenue statute as a separate tax, a tax which is to stand when the gross revenue feature falls. It is driven to this judicial separation because “no difficulty would arise in putting into effect the minimum fee

of \$15.00 required to each company vehicle operated within the state," i.e., the arithmetic is easy: 1 (vehicle) \times \$15.00 is \$15.00 and 2 (vehicles) \times \$15.00 are \$30.00. But the legislature did not authorize the Board to drop the $\frac{1}{2}$ of 1% to be applied to gross revenues for easier arithmetic, except when its application would not supply \$15.00 per annum. The use of the percentage factor could be dispensed with when it was not worth \$15.00.

II. Neither the Structural Integrity of the State Court's Opinion Nor the State Statutes Can Escape Examination by This Court on the Theory That the "Construction" of the Statutes by the State Court Is Controlling.

The Board, in its Statement Opposing Jurisdiction (Statement, 3-6) proceeds on the theory that the construction of the statutes was for the State court alone, that such construction was binding on this Court, and must be followed by this Court, right or wrong. It insisted in such statement, and doubtless will insist here—

(a) As to the \$10.00 per vehicle tax (Sections 3847.16 and 3847.17) that because the State Court—in the very teeth of the text of the statute itself—held that this tax (as well as the proceeds of the gross revenue tax) were expended to build, maintain and supervise the highways of Montana (Majority Opinion, R. 102, 112, 118-119) that construction must be accepted by this Court, if such holding is essential to sustain the statute. Of course, if this Court is bound by obtrusive, palpable errors of the lower court under the guise of "construction," then the maintenance of Federal authority would soon terminate, because a State Court could, by "construction" supply any deficiency or eliminate any error and thus remove any possibility of successful challenge. Fortunately, such a result is not countenanced. Construction or interpretation of a statute does not include

judicial legislation. An anomalous situation cannot be remedied by judicial construction in derogation of positive and controlling legislation.

Whitehead v. Galloway, 249 U. S. 79.

A *casus omissus* in a statute does not justify judicial legislation, and a court may not undertake to supply a provision left out of a statute whether by design or by mistake.

Hobbs v. McLean, 17 U. S. 567.

Ebert v. Poston, 266 U. S. 548.

United States v. Monia, 317 U. S. 424.

Moreover, the doctrine as to the binding effect of the State Court's construction cannot bar vigorous ransacking here of the statutes for their real meaning and practical effect. In *St. Louis Southwestern Ry Co. v. Arkansas*, 235 U. S. 350, at 362, this Court said:

"Upon the mere question of construction, we are of course concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State Court. We must regard the substance, rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State."

This rule has been consistently applied.

Kansas City v. Kansas, 240 U. S. 227, 231.

Mountain Timber Co. v. Washington, 243 U. S. 219, 237.

Crew Levick Co. v. Pennsylvania, 245 U. S. 292.

Standard Oil v. Graves, 249 U. S. 389.

Corn Products Mfg. Co. v. Eddy, 249 U. S. 427, 432.

St. Louis Cotton Compress Co. v. Arkansas, 260

U. S. 346, 348;

Hanover Ins. Co. v. Harding, 272 U. S. 494, 507-510.
New Jersey Tel. Co. v. Tax Board, 280 U. S. 338.
Gregg Dyeing Co. v. State, 286 U. S. 472, 476.
Wisconsin v. J. C. Penney Co., 311 U. S. 435, 443.

In the New Jersey case above, it is said:

"The language of the act and the decisions of the courts of the state are to be given consideration in determining the actual operation and effect of the tax. But neither is necessarily decisive for, whatever the terms used by the legislature to impose the tax or by the courts in reference to it, the law cannot be sustained if it operates to burden or regulate interstate business. *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 227, 52 L. Ed. 1031, 1037, 28 Sup. Ct. Rep. 638; *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 401, 72 L. Ed. 927, 929, 48 Sup. Ct. Rep. 553; *Macallen Co. v. Massachusetts*, 279 U. S. 620, 625, 73 L. Ed. 874, 878, 65 A. L. R. 866, 49 Sup. Ct. Rep. 432." (74 L. Ed. 468)

And in the *Wisconsin* case, this Court said:

"A tax is an exaction. Ascertainment of the scope of the exaction—what is included in it—is for the state court. But the descriptive pigeon-hole into which a state court puts a tax is of no moment in determining the constitutional significance of the exaction. 'In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.' *Hehderson v. Mayor of New York*, 92 U. S. 259, 268. Such has been the repeated import of the cases which only recently were well summarized by the guiding formulation for adjudicating a tax measure, that in passing on its constitutionality we are concerned only with its practical operation, not its definition on the precise form of descriptive words which may be applied to it. *Laurence v. State Tax Commission*, 286 U. S. 276, 280."

Wisconsin v. J. C. Penney Co., 311 U. S. 435, 443.

The same claim for immunity on the ground of "construction" was made by the Board.

(b) As to the Gross Revenue Tax (Sections 3847.27 and 3847.28). Indeed, it is with respect to this tax that the Board labors its "construction" argument most strongly. The Supreme Court of Montana did not find, and it could not find in Sections 3847.27 and 3847.28 any language that suggested that the legislature had the subject of (a) apportionment or (b) method of apportionment in mind. By Section 3847.27, every motor carrier must, quarterly, file a statement with the commission—

"showing the gross operating revenue of such carrier" and pay to the board

"a fee of one-half of one percent of the amount of such gross operating revenue."

Obviously, all the gross operating revenue of the carrier, the corporation, is the base for application of the percentage—nothing less. That base is explicitly stated and repetitively emphasized, "such gross operating revenue" of the carrier.

The Board argues that "the only possible point of uncertainty in the statute was as to whether the gross revenue intended in Section 3847.27 was that on operations in Montana or total operations" (Board's Statement Opposing Jurisdiction, P. 5) and asserts that "the Montana Court has removed that uncertainty and 'decided' that the gross revenue intended is only that on operations in Montana" (*Idem.* P. 5). But that is not enough. The Supreme Court of Montana can no more ignore the substance of things where a Federal right is concerned than the Board can claim a right to tax some part of interstate revenues without pointing to its authority.

Paragraph (b) of Section 3847.16, which the State Court relies upon to remove the uncertainty as to what gross revenues are intended to be burdened, commands the exclusive interstate carrier to "comply with the provisions of this Act (Opinion of State Court, R. 115), relating to the payment of compensation," i.e., the act relating to the \$10.00 per vehicle tax—not the gross revenue act, passed four years later! This direction as to compensation has nothing to do with the gross revenue act at all. The latter Act directed the carrier to report its "gross operating revenue, not the total business," performed within the limits of the State. For the Montana Court to say that the paragraph has "but one purpose," i.e., to ascertain the gross revenue derived by the company's operations in Montana in order to use that as a basis for the levy of the tax of one-half of one per cent," when the gross revenue tax enacted four years later prescribes the contrary, i.e., system gross revenue, goes beyond construction and becomes unadulterated wishful thinking. That the Montana Court is conscious of this fact, is proved by its next utterance,

"Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue is not provided by the statute, . . . no difficulty would arise in putting into effect the minimum fee of \$15.00," etc. (Opinion of State Court, R. 115)

By that language the Montana court really abandons hope of making the gross revenue statute operative. It next expresses its "opinion" that when the legislature enacts a statute imposing the duty of enforcement of such statute upon "the Board, but fails or neglects to clearly prescribe and incorporate in the Act the mode of enforcement," the Board "may adopt any fair and reasonable mode of enforcement designed to effectuate the purposes

of the Act" (Opinion of State Court, R. 116). *This expression, too, assumes the presence of a statutory duty to apportion according to some stated principle, not by guess.* When we remember that Paragraph (b) of Section 3847.16, counted on by the Montana Court to save the gross revenue tax, was speaking of the vehicle tax of \$10.00 per vehicle, it becomes clear that the Montana legislature had no such thought of "enforcement," in mind, i.e., a mode to be selected by the Board. The \$10.00 vehicle tax involved merely a count of vehicles; no attempt at apportionment is present. But even if we concede, in aid of the State Court's effort, that such a principle is recognized in a proper case, this is not such a case. In order to render admissible such delegation of legislative power, it is necessary that the statute lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which both public interests and private rights shall have due consideration. Otherwise the attempt to delegate is a nullity, particularly in the presence of Federal rights.

Wichita, etc. Co. v. Pub. Utilities Com., 260 U. S. 48, 59;

Hampton I. Co. v. U. S., 276 U. S. 394, 405;

Panama Refining Co. v. Ryan, 293 U. S. 388, 426;

Schechter Poultry Corp. v. U. S., 295 U. S. 495, 530.

The Montana Court, in its anxiety to uphold the gross revenue tax overlooks the fact that the State has an equal, or stronger, interest in (a) a proper allocation of gross revenues and (b) the means of insuring such allocation, for, absent such allocation and method, it may not levy tax tribute for its highways.

Carefully read, the opinion of the Montana Court sup-

plies no salvage by way of construction. In the final analysis it is a confession that "gross revenue in Montana" whatever that may mean—cannot be ascertained by the statute. This has not only been tacitly admitted by the Board throughout the litigation—it has been the subject of affirmative declaration. Confronted with a statute supplying as the only revenue base "the gross operating revenue of such carrier," and without a method of apportionment, the Board began to improvise.

At the trial, it endeavored to show that it had never made demand for payment of $\frac{1}{2}$ of 1% on the entire gross revenue of the company (R. 63) but had confined its demand to the \$15.00 minimum per vehicle fee (R. 66).

The Board's Secretary-Counsel testified that he could not recall that the Board had, in fact, ever made any demand on Agro for a tax based on any attempted apportionment between inter- and intra-state revenues (R. 67). This attempt by the Board to excuse the statute by non-enforcement, met timely objection:

Q. Has it ever made any demand of your company for payment of $\frac{1}{2}$ of 1% on the gross revenue of the entire gross revenue of the company?

Mr. Toomey: To which objection is made on the ground and for the reason that the statute in question provides that the Board shall collect $\frac{1}{2}$ of 1% of the gross revenue from the carrier, subject to a minimum of \$15.00 per vehicle and that there is no language in the statute and no suggestion in the statute that the tax shall be applicable to any revenues that arise from any part of the interstate operations in Montana. And upon the further grounds that under the law, the statute is to be tested not by what the Board actually does under it in administration, but what may be done under the statute.

The Court: The objection is overruled.

A. No, not to my knowledge.

"By Mr. Matson:

"Q. As a matter of fact, the demand of the Board of Railroad Commissioners, prior to the bringing of this action, was for the minimum under the gross revenue, was it not, the minimum of \$15.00 per vehicle?

"A. It was for the minimum of \$15.00 per vehicle for, I presume, the percentage of our Montana revenue. I don't know that they computed the percentage, and on account of the rather limited operation in the state, I presume they thought they might collect the minimum." (R. 63-64)

But the successor members of the existing Board may take a sterner view of their duty. In any event, the Federal right to engage in interstate commerce cannot be suspended on the mere will of administrative officers—as to whether they choose to enforce or choose to ignore a state statute.

"The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

Roller v. Hardy, 176 U. S. 398, 409.

"The law itself must save the parties' rights and not leave them to the discretion of the courts as such."

L. & N. R. R. Co. v. Stock Yards Co., 212 U. S. 132, 144.

"The constitutional validity of a law is to be tested not by what has been done under it, but what may be done under it. (State ex rel. Redmen v. Meyers, 65 Mont. 124, 210 Pac. 1064; State ex rel. Holliday v. O'Leary, 43 Mont. 157, 115 Pac. 204.) It must be borne in mind that the board of railroad commissioners is not a mere fact finding instrumentality of the government. It is a quasi-judicial body with power to hear and determine controversies and to make lawful orders based upon its findings."

C. M. & St. P. Ry. Co. v. Board, 76 Mont. 305, at 318, 247 Pac. 162.

If it be conceded that the State Court could, by judicial legislation declare that the statute operated only on the gross operating revenue of the carrier in Montana, it must be admitted that no method of apportionment is supplied. The absence of such a method suggests that the legislature did not have in mind any separation of revenues. The Board's offer to quit any attempt at apportionment and rely solely on the minimum suggests that it realizes the State Court did not find and could not announce any method of apportionment. The statute might have been drawn so as to reach only that part of gross interstate revenues arising, let us say, from earnings on miles traveled in Montana, but it was not drawn that way, and it must be applied in accordance with its language.

The Post-Appeal Legislation

After appeal to the Supreme Court of the United States was perfected (R. 152) the Legislative Assembly of Montana enacted Chapter 73, Laws of Montana, 1947 (pp. 88-90 of 1947 Session Laws) amending Sections 3847:26 and 3847:27 R. C. M. 1935. Section 2 of Ch. 73, Laws 1947, amended the gross revenue tax, with resulting current text as follows:

"3847.27. *Additional Fees Covering Motor Carriers.*

In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity or permit issued by the board of railroad commissioners, shall between the first and fifteenth days of January, April, July and October of each year, file with the board of railroad commissioners a statement showing the gross operating revenue of such carrier for the preceding three (3) months of operation, or portion thereof, and shall pay to the board a fee of one-half of one (1) per cent of the amount

of such gross operating revenue; and in the event that such carrier operates in interstate commerce, the gross operating revenue of such carrier within this state shall be deemed to be all the revenue received from business beginning and ending within this state, and a proportion based upon the proportion of the mileage within this state to the entire mileage over which the business is done of revenue on all business passing through, into or out of this state; provided, however, that the minimum fee which shall be paid by each Class A and Class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars (\$30.00) and the minimum annual fee which shall be paid by each Class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars (\$15.00)."

The Act has no retroactive effect, Section 3 thereof giving it force and effect, "*from and after its passage and approval*" (p. 90). However, the amendments found necessary by the legislature (laying aside any questions as to their validity) indubitably exhibit that Aero's position with respect to the section before amendment—the subject of this present inquiry for all taxes from 1937 through 1946—is well taken. The amendatory legislation attempts to do that which the prior legislation did not do, *viz.*,

(1) makes the gross revenue tax applicable to an interstate carrier operating under a "permit" as well as a carrier operating under a certificate of public convenience and necessity;

(2) provides that gross revenues of the carrier shall be taken to mean "all the revenue received from business beginning and ending within this state" (sic), and

(3) attempted apportionment, by declaring that as to such business, "a proportion based upon the pro-

portion of the mileage within this state to the entire mileage over which the business is done of revenue on all business passing through, into, or out of this state" was to be taken for application of the $\frac{1}{2}$ of 1% rate.

It is submitted that the amendatory legislation confesses the validity of Aero's objections to the text of the statute before amendment.

III. The Flat Ten Dollar Per Vehicle Tax Required by Section 3847.16, R. C. M., 1935, in so Far as it Applies to an Interstate Carrier, Violates the Commerce Clause of the U. S. Constitution.

A. The Flat Ten Dollar Per Vehicle Tax Demanded By the Board Is Not Compensatory In That the Proceeds Are Not Appropriated For Highways Purposes.

The Board of Railroad Commissioners of Montana seeks to impose a flat tax of ten dollars per vehicle, pursuant to Section 3847.16 of the Motor Carrier Act, R. C. M., 1935, on every motor vehicle operated by the Aero Transit Company over the Montana highways. Aero is exclusively an interstate carrier, and already pays truck registration fees, truck license fees and a gallonage gas tax on gasoline to the State of Montana. (Opinion of State Court, R. 194.) And an *ad valorem* tax (Sec. 1759, R. C. M. 1935, as amended by Ch. 72, Laws 1937.)

A state may impose upon motor vehicles using its highways exclusively in interstate commerce certain taxes if, and only if, the taxes can be said to be compensatory for the use of the highways. In the *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183 (1931), the Supreme Court held that tax imposed by Tennessee upon the privilege of operating a bus in interstate commerce was invalid because the tax was not imposed solely as compensation for the

use of highways or to defray the expense of regulating motor traffic:

"While a State may not lay a tax on the privilege of engaging in interstate commerce . . . it may impose . . . a charge as compensation for the use of the public highways. . . . The tax cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for the use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to use. . . . or by the express allocation of the proceeds of the tax to highway purposes. Brandeis, J., in *Interstate Transit, Inc. v. Lindsey*, pp. 185-186.

A State that levies a tax on an interstate carrier must show affirmatively that the tax is exacted as a highway compensation measure. Such a showing may be made by the "express allocation of the proceeds of the tax to highway purposes." In *Sprout v. City of South Bend*, 277 U. S. 163 (1928), a license fee imposed by a city ordinance of South Bend, Indiana, upon interstate buses was held invalid because there was no suggestion in the language of the ordinance that the proceeds were to be applied to the construction or maintenance of the city streets. In 1937 a California license fee on automobiles towed from without the State for sale was held invalid because the Appellant did not show that the fees collected were used to meet the cost of highway construction or maintenance (*Ingels v. Morf*, 300 U. S. 290).

There is no express allocation of the proceeds of the flat ten dollar per vehicle tax demanded by the Board to highway purposes. The Montana statutes not only fail to show that the proceeds are used for highway maintenance, construction or repair, but they show, affirmatively, that the proceeds are used for purposes unrelated to high-

ways or the regulation of motor traffic. Section 3847.17 prescribes that the fees collected under the Act shall be placed to the credit of the motor carrier fund, and that fund is "available for the purpose of defraying the expenses of administration of this act, and the regulation of the businesses herein described" (Sec. 3847.17 R. C. M. 1935). The "availability" did not long endure. The history of the use made by the legislature of the motor carrier fund established in 1931 by the section quoted is set forth in Appendix 4. The money in the motor carrier fund is, in short, appropriated for carrying out all the duties of the Railroad and Public Service Commission. The duties of the Railroad and Public Service Commission, for which the proceeds are appropriated, include the supervision and regulation of thirty activities (Secs. 3879-3913, 3859-3878, 3913.1-3913.24, 3914-3946, 3848-3858, R. M. C., 1935), such as the regulation and supervision of railroads, public utilities, common carriers, pipe lines, and the manufacture or production of flour, bran and millfeed.

Even if all of the proceeds were allocated to the Board alone for defraying expenses incurred in the regulation of motor carriers only, the tax would not be compensatory if imposed on an interstate carrier. The expenses incurred by the Board in conducting hearings and regulating motor carriers are not increased by Aero's operations. Aero cannot be subjected to the discretionary powers of the Board, necessitating "a showing of public convenience and necessity" (Sec. 3847.23, R. C. M., 1935). The duties of the Board with respect to interstate carriers regarding the regulation of rates, fares, charges, accounts, service and safety operations (Sec. 3847.3) are superseded by the enactment of the Federal Motor Carrier Act, 1935, 49 U. S. C. Secs. 301-327, which vested the authority to regulate the rates, fares, charges (49 U. S. C., Sec. 316), ac-

counts, service and safety operations (49 U. S. C., Sec. 304) of interstate carriers in the Interstate Commerce Commission.

That the tax challenged is not laid as compensation for the use of the highways, is confirmed by contrasting Section 3847.17 and the appropriation bills set forth in Appendix No. 4 with those Montana statutes which admittedly provide for defraying the cost of constructing and maintaining highways. For example, Aero pays Montana registration fees (\$22.50 per truck with $1\frac{1}{2}$ -2 ton capacity, and \$37.50 per truck with 2-3 ton capacity), license fees and a gasoline tax (five cents per gallon purchased). By the express terms of Sections 1760(c), as amended by Ch. 200, Laws of Montana, 1945, the net license fees derived from the registration of motor vehicles are to be used for the construction, repair and maintenance of public highways, except State and Federal highways. By the terms of Sections 2381.2, 2381.7 and 2396.2, R. C. M., 1935, the proceeds of the 5¢ gallonage tax on gasoline are allocated to the State highway fund for the "construction, betterment and maintenance, etc., of the Federal highway system of highways. . . ." No appropriations are made to the State Highway Commission or to the State Highway Fund out of the General Fund of the State.

It is not difficult to see why the proceeds of the flat ten dollar per vehicle tax required by Section 3847.16 are not used for highway maintenance, because the money paid by Aero for the uncontested registration, license and gas taxes (totalling \$2089.35 for 1939) average about $2\frac{1}{3}$ to $2\frac{1}{2}$ cents per mile, which stands high in comparison to the less than one cent per mile average throughout the rest of the United States (R. 60-61). It would seem by this comparison that Aero already pays sufficient compensatory taxes for the use of Montana's highways without the added imposition of the flat ten dollar per vehicle tax.

It is true that it was said in *Clark v. Poor*, 274 U. S. 554 (1927), on page 557, that the "use to which proceeds are put is not a matter which concerns the plaintiffs." The statement was merely *dictum*, however, because the proceeds of the tax there in question were actually appropriated in accordance with Sections 614-94 and 614-96, Page's Annotated Ohio General Code, 1926, which specifically prescribe that the proceeds are for the "maintenance and repair of public roads, highways and streets and for no other purpose, and shall not be subject to transfer to any other fund."

B. The Flat Ten Dollar Per Vehicle Tax Demanded By the Board Is Not Compensating In That the Tax Bears No Reasonable Relation to the Use of the Highways for Which the Charge Is Made.

Not only are the proceeds of the flat ten dollar per vehicle tax allocated to purposes other than highways, but also the tax bears no reasonable relation to the use of the highways for which the charge is made. Reasonable relationship to use may be shown by taxes such as a mileage tax directly proportioned to use, or taxes related to the degree of wear and tear incident to the use of motor vehicles of different sizes and weights. *Interstate Transd., Inc. v. Lindsey*, 283 U. S. 183, *supra*. In *McCarroll v. Dixie Greyhound Lines*, 309 U. S. 176 (1940), the Supreme Court held an Arkansas statute invalid which levied a tax on the gasoline in the tanks of motor carriers entering the State because the measure of the tax bore no fair relationship to use made of the highways. Also, in *Prouty v. Coyne*, 55 F. (2d) 289 (1932) a statute was held violative of the commerce clause because a fixed flat charge was made against

vehicles, graduated according to weight of the vehicles, but regardless of the mileage traveled or the tonnage carried.

Again it is helpful to compare the flat tax with the Montana taxes already paid by Aero. The registration fees are graduated according to weight (Section 1760 R. C. M. 1935, as amended by Ch. 200, Laws 1945), and the gas tax bears some relation to mileage, in that the amount of gas purchased in Montana is dependent upon the number of miles traveled, as is the case with any gallonage tax for gasoline for motor vehicles.

There is not even a remote relationship between the amount of the flat tax and the use Aero makes of the highways. Brandeis, J. in *Sprout v. City of South Bend*, *supra* (page 170), pointed out that such a flat tax cannot be said to be dependent upon the actual use made of the highways:

"A flat tax, substantial in amount, and the same for buses plying the streets continuously in local service and for buses making, as do many interstate buses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways."

The statute exacting the flat tax makes no distinction between carriers engaged exclusively in interstate commerce and carriers engaged exclusively in intrastate commerce. Also, there is no distinction made between carriers that operate at a regular schedule between fixed termini and carriers whose trips are irregular and infrequent. If Aero complies with Section 3878.16, it must pay, even though its trips over the Montana highways are occasional and infrequent, the same tax for each vehicle as those who may be constantly using the highways. As to those engaged in interstate commerce, the act must be held to be unconstitutional. *Prouty v. Boyne*, *supra*, p. 293.

C. *The Flat Ten Dollar Per Vehicle Tax Considered in the Light of State Taxes Imposed on Interstate Motor Carriers Which Have Been Upheld By the Supreme Court.*

In order to understand the burdensome nature of the flat tax, it is important to distinguish it from some of the State taxes imposed on interstate carriers which have been upheld by the Supreme Court of the United States. For example, in 1935 the Court upheld a twenty-five dollar per vehicle tax imposed by Georgia on Aero, *Aero Transit Co. v. Georgia Commission*, 295 U. S. 285 (1935). The tax in question was a registration tax similar to and less than the registration tax already paid Montana by Aero in accordance with Section 1760, R. C. M., 1935, as amended by Ch. 200, Laws 1945, or prior to amendment. Moreover, the funds of the Georgia registration tax are "paid to the State Highway Department for use in maintenance and repair of the highways," Section 18, of the Public Utilities Commission Act, Georgia Laws Ex. Session, 1931.

In *Morf v. Bingamen*, 298 U. S. 407 (1936), the Supreme Court upheld a New Mexico registration fee imposed on vehicles towed from out of the State for sale (the fee amounted to \$7.50 for vehicles under own power, and \$5.00 for vehicles towed, Chap. 56, p. 101, New Mexico Session Laws of 1935). The Court, citing *Clark v. Poor*, 274 U. S. 554, stated that it was not important if part of the fees collected were not devoted directly to highway maintenance. That statement cannot be used as support for the Montana flat tax, because the New Mexico tax was a registration fee similar to the registration fee already paid Montana by Aero, and part, at least, of the proceeds of the New Mexico registration fee were used for highway maintenance. A year after deciding *Morf v. Bingamen*, the Supreme Court held a similar registration fee imposed on towed vehicles

for sale invalid for the very reason that the fees collected were not used to meet the cost of highway construction or maintenance (*Ingels v. Morf*, 300 U. S. 290).

State taxes which impose burdens on interstate commerce violate the commerce clause and are void; *State v. Montana-Dakota Utilities*, 114 Mont. 161 (1943). The tax "cannot be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for the use of the highways." *Lindsey* case, 283 U. S. 183. The flat ten dollar per vehicle tax required by Section 3847.16, R. C. M., 1935, is not compensatory because the proceeds are not allocated for highways purposes; and because the tax bears no reasonable relation to use made of the highways.

D. The Flat Tax Must Be Paid Before an Interstate Operator Can Enter Montana and Is Therefore a Privilege Tax.

The flat license tax of \$10.00 per vehicle must be paid "at the time" the carrier is issued its certificate to operate, and "annually thereafter," before it may enter upon the highways of Montana (Section 3847.16 R. C. M. 1935). It is, then, a flat tax imposed on the exercise of a privilege granted by the Federal Constitution, i.e., the very privilege of carrying on interstate commerce, the movement of the truck over the road.

But it is settled that,

"A state may not exact a charge for the enjoyment of a right granted by the Federal Constitution."

Murdock v. Pennsylvania, 319 U. S. 105, 113, *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 56-58.

"The power to tax the exercise of a privilege is the power to control or suppress its enjoyment."

Magnano Co. v. Hamilton, 292 U. S. 40, 44-45.

While the commerce clause draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes,

"... that is no reason why 'this court should shut' its eyes to the nature of the tax and its distinctive influence."

Murdock v. Pennsylvania, 319 U. S. 105, 113.

Under the Montana statute, the issuance and the continuance of a permit certificate, or license, is dependent on the payment of the \$10.00 vehicle tax laid by Section 3847.16.

As the statute says:

"(c) Upon the failure of any motor carrier to pay such compensation, *when due*, the Board may, in its discretion, revoke the carrier's certificate or privilege and no carrier whose certificate or privilege is so revoked shall again be authorized to conduct such business until such compensation shall be paid" (Par. (c) Section 3847.16 R.C.M. 1935).

Obviously, this is the law invoked by the Board in its complaint against Aero (R. 14).

Moreover, the statute continues:

"All compensation, fees or charges, *imposed and accruing under the provisions of this act*, shall be a lien upon all the property of the motor carrier used in its operations under this act; ... shall attach at the time the tax is due; and shall have the effect of an execution duly levied." (Par. (d) Section 3847.16 R.C.M. 1935). (All italics ours.)

"All property used in its operations under this act," applied to Aero can only mean every interstate vehicle entering Montana. Absent payment of the fee, the Sheriff of any county may seize the interstate vehicle and sell it (Section

9431, R.C.M. 1935). And this without the carrier having its day in court.

"Interstate commerce can hardly survive in so hostile an atmosphere."

Best & Co. v. Maxwell, 311 U. S. 454, 456.

And Montana has heretofore evinced hostility to interstate commerce in attempt to lay a gross tax on interstate facilities, which, however, was held invalid by this Court as to such facilities.

Cooney v. Mountain States Tel. & Tel. Co., 294 U. S. 384.

The actual or the potential discrimination in fixed-sum license taxes condemns them.

Robbins v. Shelby County, 120 U. S. 489;

McGoldrick v. Berwind-White Co., 309 U. S. 33, and the line of cases referred to therein.

The arbitrary imposition of tax lien reaching out to all of the property of the carrier used in its operations under the Montana Act—and any piece of equipment may be so used—giving the lien the effect of an execution issued, suggest a peculiarly provincial concept of interstate commerce by the State of Montana. A concept far removed from the attitude that a State must take under the view that payment of even a lawful tax may not be enforced by the exclusion of the taxpayer from interstate commerce.

Western Union Tel. Co. v. Massachusetts, 125 U. S. 350;

St. Louis & Southwestern R. R. Co. v. Arkansas, 235 U. S. 350.

Section 3847.16, R.C.M. 1935, attempts to close the road to interstate commerce within the meaning of—

Buck v. Kuykendall, etc., 267 U. S. 307;

Bush & Sons v. Maloy, 267 U. S. 317.

IV. The Gross Operating Revenue Tax Required by Section 3847.27, in so Far as it Applies to an Interstate Carrier, Violates the Commerce Clause of the U. S. Constitution.

A. The Tax Required by Section 3847.27 Is a Tax on Aero's Gross Operating Revenue.

In addition to the uncontested license, registration, *ad valorem* and gasoline taxes and the challenged ten dollar per vehicle tax, the Board seeks to enforce the payment of a gross operating revenue tax required by Section 3847.27 of the Motor Carriers' Act. Sec. 3847.27 requires that every motor carrier holding a certificate of public convenience and necessity issued by the public service commission file every three months with the commission "a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof." The carrier must pay to the Board a fee of "one-half of one per cent of the amount of such gross operating revenue, provided that the minimum annual fee paid by each Class C carrier (which includes Aero) is fifteen dollars for each vehicle. Aero has no operating revenue other than that derived from interstate commerce. Consequently, any tax imposed on its gross revenue, whether on the basis of a percentage or a fixed minimum, is necessarily a tax imposed on revenue derived from interstate commerce.

The statute clearly includes the gross operating revenue of the carrier. Nothing less. That is emphasized by repetition of the tax base, *i.e.*, "gross operating revenue" without geographical limitation, or any other qualification.

B. *The Gross Operating Revenue Tax Cannot Apply to Interstate Carriers under the Federal Motor Carrier Act.*

1. The gross operating revenue tax applies to motor carriers holding a certificate of public convenience and necessity issued by the Montana "Public Service Commission."

The gross operating revenue tax applies to motor carriers holding certificates of public convenience and necessity issued by the Montana Public Service Commission (Sec. 3847.27). Although interstate carriers do not have to make a "*showing of public convenience and necessity*," they may not operate over Montana highways without first having obtained the certificate or "permit" (Sections 3847.10 and 3847.23).

2. The Montana Public Service Commission can not require an interstate carrier to obtain a certificate of public convenience and necessity, because the Federal Motor Carrier Act, which conferred upon the Interstate Commerce Commission the exclusive power of issuing a certificate of public convenience and necessity, superseded State legislation.

Aero already operates under a certificate of public convenience and necessity issued by the Interstate Commerce Commission in accordance with the Federal Motor Carrier Act, 1935, 49 U.S.C., Sections 301-327 (R. 8—admitted by Board at R. 49). Aero could not engage in interstate commerce without having obtained the latter certificate (49 U.S.C. Sec. 306).

As far as counsel for appellant know, neither the Montana Supreme Court nor the Supreme Court of the United States has construed the Federal Motor Vehicle Act with respect to its bearing on State powers. Texas, however, has had considerable litigation involving the implications

of the Act. In *Railroad Commission of Texas v. Bates*, 108 S.W. (2d) 789 (1937), the Texas Civil Court of Appeals held that the Federal Motor Carrier Act deprived the State Railroad Commission of authority to require an interstate motor carrier to obtain a State certificate of public convenience and necessity, and in the absence of such certificate, to prevent the carrier from carrying on its business. The Civil Court of Appeals followed the Texas Supreme Court reasoning that:

“Congress, having assumed jurisdiction over this class of litigation, such control is exclusive, and such act of Congress superseded State legislation.” Sharp, J., in *Southwestern Greyhound Lines v. Railroad Commission*, 99 S.W. (2d) 263, 268 (1936).

It follows that the Montana Public Service Commission has been deprived, by the Federal Motor Carrier Act, of authority to require an interstate carrier to obtain a State certificate of public convenience and necessity. Therefore, the gross operating revenue tax cannot apply to interstate carriers.

And see: *Buck v. Kaykendall*, 267 U. S. 307;

Bush & Sons v. Maloy, 267 U. S. 317, decided prior to the Federal Motor Carrier Act.

C. *The Gross Operating Revenue Tax Is Neither Apportioned to the Volume of Business in Montana Nor Is It Compensatory.*

1. A State cannot tax the gross operating revenue of an interstate carrier unless the tax is apportioned to the volume of business in the State.

The gross operating revenue tax, since it applies to an exclusively interstate carrier, constitutes an undue burden on interstate commerce, and exposes an interstate carrier to a multiplication of State taxes. Such a tax is violative

of the commerce clause of the Constitution of the United States.

Those engaging in interstate commerce cannot be subjected to a tax levied on their gross receipts as such, *New Jersey Tel. Co. v. Tax. Board*, 280 U. S. 338 (1930). In 1939 the Supreme Court held that a Washington tax levied on one-half of one per cent of the gross receipts of a business of marketing fruit shipped in interstate commerce was invalid under the Constitution:

"It is enough for present purposes that under the commerce clause . . . state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state." Stone, J., in *Gwinn, White and Prince, Inc. v. Henneford*, 305 U. S. 434, 438-439 (1939).

The *Henneford* case, *supra*, describes discrimination against interstate commerce by the imposition of the "risk of a multiple burden to which local commerce is not exposed," and warns that "such a multiplication of state taxes, each measured by the volume of commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove" (pp. 439-440). No other result could flow from approval by this Court of the Montana statute.

2. The fifteen dollar per vehicle minimum demanded by the Board is such that the tax is in effect a gross operating revenue tax not apportioned.

If it is true, as the Board claims in its effort to save the tax, that the Board is not seeking a percentage of Aero's gross operating revenue from all sources of its interstate business, it is equally true that the Board is not seeking

a percentage of Aero's gross operating revenue apportioned to the volume of its business in Montana. The Board asserts that it seeks to collect only the minimum annual fee of fifteen dollars for each vehicle (R. 63-68). The large disparity between the arbitrary figure demanded as a minimum fee and that amount which would represent a tax on Aero's business based on apportionment illustrates that the tax is in effect a gross receipts tax not apportioned. The minimum is merely a device for circumventing apportionment. For example, if apportioned to the load miles operated in Montana (estimated by using an average income per mile figure based upon the probable load factor in Montana), the gross operating revenue for 1939 was approximately \$11,961.00. Although the tax at one-half of one per cent of that figure is only \$59.80, the Board is demanding \$660.00 which is tax based on the fifteen-dollar minimum for that year. An even wider disparity is shown by comparing the figures for 1942. The revenue approximated \$16,160.50, one-half of one per cent of which is \$80.00, whereas the tax for that year on the basis of the minimum is \$1,035.00 (R. 61-62).

The amounts demanded by the Board, therefore, bear no relation to a fair apportionment of Aero's business in Montana. Since the minimum amounts demanded are eleven to thirteen times greater than one-half of one per cent of the approximate gross operating revenue in Montana (R. 61-62), the tax is in effect measured by revenue derived from activities in commerce which extend beyond the territorial limits of Montana. The minimum, therefore, subjects Aero to the risk of a multiple burden in the same manner if not in the same degree as a tax on one-half of one per cent of the gross operating revenue of all of Aero's interstate business.

3. The language of Section 3847.27 is such that the tax is a gross operating revenue tax not apportioned.

The amount demanded by the Board is the arbitrary minimum, which precludes possible apportionment to Aero's business in Montana. The Board could, however, in accordance with the language of Section 3847.27—and it *must*, if it is obedient to the plain language of the statute—lay the tax on Aero's entire gross operating revenue. *Section 3847.27 makes no mention of apportionment.* In 1932, a similar tax imposed upon a contract carrier *was treated in accordance with the language of the statute:*

“The statute might have been drawn so as to reach only the revenue derived from operators within South Carolina, but it was not so drawn, and if applied at all must be applied in accordance with its language . . . the act therefore constitutes a direct burden upon interstate commerce.” *Cochran, J., in Nutt v. Ellerbe*, 50 F. (2d) 1058, 1064 (1932).

The fact that the statute neither prescribes nor suggests any formula for apportioning the tax indicates that there is no intent implicit in the statute to apportion the tax. The unapportioned gross operating tax is invalid.

Case of the State Freight Tax (1849) 15 Wall. 232;

Fargo v. Michigan (1887) 121 U. S. 230;

Philadelphia & Southern Steamship Co. v. Pennsylvania (1887) 122 U. S. 326;

Leloup v. Port of Mobile (1888) 127 U. S. 640;

Ratterman v. Western Union Tel. Co. (1888) 127 U. S. 411;

Western Union Tel. Co. v. Alabama (1889) 132 U. S. 472;

Galveston, H. & S. A. Ry. v. Texas (1908) 210 U. S. 217;

Meyer v. Wells Fargo & Co. (1912) 223 U. S. 298;

New Jersey Bell Tel. Co. v. State Board of Taxes,
(1930) 280 U. S. 338;

Fisher's Blend Station, Inc. v. State Tax Commission,
(1936) 297 U. S. 650;

Puget Sound Stevedoring Co. v. State Tax Commission (1937) 302 U. S. 90.

In commenting on the last case cited, Powell says:

"Hence the immunity of transportation receipts would seem to follow a fortiori from the protection here given to the returns from loading and unloading"
(LX Harvard Law Review, No. 5, 748).

He was referring, of course, to immunity from unapportioned gross revenue taxes on interstate commerce.

Joseph v. Carter & Weekes, — U. S. —, No. 29, October Term, 1946 (and No. 30, its companion);

Freeman, Trustee, v. Hewit, — U. S. —, No. 3, October Term, 1946.

Even an admeasured or apportioned license tax on a corporation engaged exclusively in interstate commerce may be invalid. And Aero has no other engagement.

Cheney Brothers Co. v. Massachusetts, 246 U. S. 147 (1918);

Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203 (1925)

Fargo v. Michigan, 121 U. S. 230;

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90;

Joseph v. Carter & Weekes, No. 29, October Term, 1946.

The imposition of a gross revenue tax counsels closer examination into the realities. Such a tax "affects each transaction in proportion to its magnitude, irrespective of whether it is profitable or not, and may be sufficient to make

the difference between profit and loss," and hence break down intrastate as well as interstate commerce.

U. S. Glue Co. v. Oak Creek, 247 U. S. 321, 329 (1918).

If we look at Aero's operations from the standpoint of *sales of service*, unapportioned gross revenue taxes are equally obnoxious to the Commerce Clause. Aero sells a service, i.e., physical transport of goods from a point in one State to a point in another State. It is a motor carter, a vendor of interstate transport, offering to sell its services to anyone who desires to move goods from one State to another among any of the forty-eight States, and who will pay the tariff rates. Its sale contract is initiated when it picks up a cargo from consignor; its sale contract is performed when it delivers the cargo to consignee. Consignor and consignee may be different persons or the same persons. The service purchased is the continuous and speedy movement of the cargo from one State to the other, absent essential traffic delays and supervening accidents. Montana may not reach out and impose a tax on the sale of services not performed in Montana—and that is just what Montana does when it attempts to tax the dollars earned in Massachusetts or North Dakota by draining them into its gross revenue scheme.

Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938);

Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (1939);

Freeman, Trustee, v. Hewit, — U. S. —, No. 3, October Term, 1946.

The event upon which the tax is conditioned is a continuous service, a continuous movement (save for stops for fuel and rest for drivers) from State to State over the highways of the country. If Montana can lay a tax on

Aero's gross operating expenses so can every State along the route.

Western Live Stock v. Bureau of Revenue, 303 U. S. 250.

Similar taxes could be imposed by each State through which the commerce passes, i.e. Massachusetts can levy on the earnings from highway mileage in every State from Boston to Helena; North Dakota may do the same, each State along the route reaching for the dollars arising from the other State's facilities. In such a situation it is of no moment that the same tax is laid on intrastate commerce within Montana by that State. Aero has no intrastate business in any State. Every one of the forty-eight may appropriate some part of Aero's revenues for Montana's mileage and the mileage in every other State. This is the vice this Court must defeat if interstate commerce is to survive.

McGoldrick v. Berwind-White Co., 309 U. S. 33, at 45 n. 2, 48.

"But that, for the time being, only one state (i.e. Montana) has taxed, is irrelevant."

Freeman, Trustee v. Hewit, — U. S. —, No. 3, October Term, at page 7 of printed opinion.

Montana may not dismember the continuous event or act of transport on any theory of taxing Aero for the consignor's delivery of goods to the carrier in Montana, or receipt by the consignee in Montana.

Bacon & Sons v. Martin, 305 U. S. 380;

Dep't. of Treasury v. Wood Preserving Co., 313 U. S. 62.

Transportation by land, as well as by water, is impossible without loading and unloading. The State "incidents" of consigning and delivering to the interstate carrier begin the commerce and the acts of receipting for, and receiving,

the load or cargo, terminate it; but they are indispensable events in interstate commerce, and in the sale of interstate services.

Puget Sound Stevedoring Company v. Tax Commission,
302 U. S. 90;

Joseph, Comptroller of City of New York v. Carter & Weekes, — U. S. —; No. 29, October Term, 1946
(and No. 30, its companion);

By way of contrast:

Coverdale v. Pipe Line Co., 303 U. S. 604, 609;

Southern Pacific v. Gallagher, 306 U. S. 167, 178;

Richfield Oil Corp. v. State Bank, 329 U. S. 69.

And see:

Overnight Motor Co. v. Missel, 316 U. S. 572;

Levinson v. Spector Motor Service, — U. S. —, No. 22,
October Term, 1946.

4. The tax is not compensatory.

The proceeds of the gross operating revenue tax are handled in the same way as the proceeds of the ten dollar per vehicle tax. Section 3847.28, R. C. M., 1935, allocates the proceeds to the motor vehicle fund, which is appropriated for the various unrelated purposes set forth in Appendix No. 4 of this brief. Although Class A and Class B carriers pay a minimum of thirty dollars per vehicle, there is not only no reasonable relation, but no relation to use made of the highways. There is, in fact, no motor vehicle fund. The State has abandoned the pretense of relation to highway use by seizing all moneys for the general fund (Appendix No. 4).

The gross operating revenue tax required by Section 3847.47 is therefore invalid under the Commerce Clause of the Constitution of the United States because it is not ap-

portioned to the volume of business in Montana. (See Division VI of this Brief, at page 77.) The attempt at apportionment made by the legislative assembly in 1947 (Ch. 73, Laws of Montana, 1947) some twelve years after Section 3847.27 was enacted, is merely an expression of belated hindsight.

V. The Montana Taxes Are Not "In Lieu" Taxes

There is no room to argue that either of the taxes are in lieu of *ad valorem* taxes on Aero's trucks. While appellees have not suggested that either of the taxes can be sustained as a method of arriving at the fair measure of a tax substituted for local property taxes (within the meaning of the doctrine stated in *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, and *U. S. Express Co. v. Minnesota*, 223 U. S. 335); their repetition of the generality that "interstate commerce must pay its way," their invention of a tax base and their further attempt to sever the \$15.00 minimum from the gross revenue statute suggests that they may put forward such a proposal. They do complain that Aero "seeks to use the public highways of Montana for pecuniary gain without contributing its share of fees for the construction, maintenance, operation and regulation of the public highways" of Montana (R. 3). It is not tenable for the sufficient reason that (a) "before" any truck owned by a resident of Montana or any truck owned by a non-resident of Montana (Section 1759 R. C. M. 1935 as amended by Chapter 72, Laws of Montana, 1937), or any "foreign licensed motor vehicle" may be operated on the highways of Montana for hire, or "before" the owner of the foreign licensed vehicle "uses" the vehicle "in gainful occupation or business enterprise" in Montana, such person must register the vehicle, pay the registration fees, receive and display the license plates (Section 1760.7, R. C. M. 1935, as amended by Ch. 296, Laws of Montana, 1947) and (b) at

the time of applying for registration, submit the application for registration to the county assessor for assessment of the vehicle and, in the words of the applicable statute (Section 1759, R. C. M. 1935, as amended by Section 1 of Chapter 72, Laws 1937) the applicant shall—

“ . . . upon the filing of said application, (1) pay to the county treasurer the registration fee, as provided in Section 1760 Revised Codes of Montana, 1935, and shall also at such time (2) pay the taxes assessed against said motor vehicle for the current year of registration (unless the same shall have been theretofore paid for said year) before the application for registration or re-registration may be accepted by the county treasurer. The county treasurer is hereby empowered to make full and complete investigation of the tax status of said vehicle and any applicant for registration or re-registration must submit proof with respect thereto from the tax records of the proper county at the request of the county treasurer; provided, that nothing herein shall be deemed to conflict with the provisions of Section 1756.6 Revised Codes of Montana, 1935, and the provisions hereof shall be construed in connection therewith.” (Laws 1937, pp. 124-125)

Thereafter, the county treasurer distributes the receipts from the registration fees “in relative proportions required by the levies for State, county, school district and municipal purposes in the same manner as other personal property taxes are distributed” (Section 1759.3 R. C. M. 1935, as amended by Section 1 of Ch. 200, Laws of Montana, 1945).

In addition, the State has set up a special registration procedure for the owners of “foreign” motor vehicles, under the jurisdiction of the sheriff “at the first county seat entered” (Section 1760.2, R. C. M. 1935).

By these statutes, the “foreigner” is placed on the same footing as the local trucker. Hence, there is no ground for asserting that either the flat vehicle tax or the gross revenue

tax is in lieu of *ad valorem* taxes which, except for them, would be paid only by the intrastate operator. The "foreign" owner must pay the same *ad valorem* tax as the resident of Montana pays, vehicle for vehicle, and before his vehicle may lawfully turn a wheel on a highway in Montana. Indeed, the payment of the *ad valorem* taxes before operation of the vehicle is for the very privilege of operating the vehicle in interstate commerce (Sections 1759 and 1760.7, R. C. M. 1935).

VI. The Doctrine of "Compensation for Use of the Highways" Does Not Remove the Limitations on the Power of the States to Regulate or Affect Interstate Commerce.

The Board attempts to make much of the doctrine that the State may exact compensation "for the privilege of using its highways." It does not always state the doctrine in terms of "compensation," for example:

"It is well settled that a state may impose upon vehicles used exclusively for interstate transportation a fair and reasonable tax for the privilege of using its highways for that purpose," i.e., interstate transportation (Board's Statement Opposing Jurisdiction, p. 7).

That indicates that the Board feels the interstate carrier must pay for the interstate privilege, not compensate for the use of facilities. This is the very thing condemned by this Court in *Buck v. Kuykendall*, 267 U. S. 307. This is, in reality, the same view the State of Montana took in *Cogney v. Mountain States Tel. & Tel. Co.*, 294 U. S. 384. Such view was rejected by this court in the *Cooney* case, and before in *Leloup v. Port of Mobile*, 127 U. S. 640, *Crutcher v. Kentucky*, 141 U. S. 47, *Bowman v. Continental Oil*, 256 U. S. 642; and since, in *Murdock v. Pennsylvania*, 319 U. S. 105, *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S.

90, and in *Joseph v. Carter & Weekes*, No. 29, October Term, 1946. And such view was excluded by the passage of the Federal Motor Carrier Act (Title 49 U. S. C. A. 301).

But, conceding that the Board is thinking of "compensation," the phrase serves no more useful purpose than other phrases used to tag permissible action, i.e., "Local incident," "direct," "measure of value of local franchise," "in lieu of tax," etc. There is not the slightest suggestion in the cases cited by the Board that the compensation doctrine defeats either the principle

(a) that taxes on *unapportioned* gross revenues of transportation companies are invalid, (*Philadelphia & Southern S. Co. v. Pennsylvania*, 122 U. S. 326; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co. v. Alabama*, 132 U. S. 472; *Galveston, H & S. A. Ry. Co. v. Texas*, 210 U. S. 217; *Meyer v. Wells, Fargo & Co.* 223 U. S. 298), or,

(b) the principle that taxes on gross revenues of transportation companies even where admeasured or related to local activities, may be equally invalid (*Fargo v. Michigan*, 121 U. S. 230; *New Jersey Bell Tel. Co. v. Board*, 280 U. S. 217; *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90; *Joseph v. Carter & Weekes*, No. 29, October Term, 1946).

In other words, the fact that the use of state highways is involved, makes no difference under the Federal Constitution. A definite, reasonable relationship between tax and use must affirmatively appear; otherwise the interstate carrier is put in peril of arbitrary exaction, and the national commerce in jeopardy. This Court, whether encouraged by the confidence exhibited by Congress in the court's interpretations of the Commerce Clause (*Joseph v. Carter & Weekes*, No. 29, October Term, 1946); or otherwise, will not imperil interstate commerce on highways any more than on the

desks and wires of brokers (*Freeman v. Hewit*; No. 3, October Term, 1946). Indeed, transport via highway was originally, and remains today, the first concept of "interstate commerce" as that phrase is used and understood by our people. Absent transport by road or rail, interstate commerce would, in truth, be an airy phrase.

Before examining the limitations on the "compensation" doctrine, let us look, briefly, at the provisions made by the State for highways. There is much loose talk about highways "owned" by the state. (There is also much loose thinking which assimilates state boundary lines to "gates," "ports of entry," etc. Indeed, respondent is so imbued with the compartmental conception of the States in the area of national commerce, that it overlooks the fact that its attempts to stop the commerce, actually to arrest it, to impound Aero's vehicles (Par. "C" of Aero's Cross-Complaint, R. 12, admitted by Board's Answer, Par. I, R. 49) would soon injure intrastate commerce in Montana. It stands admitted that Aero moves over the highways of the United States, household goods and office furniture *incident only to a change of residence of the owner* (Par. "A" of Aero's Cross-Complaint, R. 8, admitted by Answer of Board, at R. 49). Without their household goods or their office equipment, the personal and business activities of the owners would be largely defeated, if not suppressed. The right of our citizens freely to move about and follow their lawful pursuits would be of little value, and the 5th and 14th Amendments of historical interest only (*Crandall v. Nevada*, 6 Wall. 35).

The United States of America has been a builder of highways in Montana from the days of the Mullan Trail which connected the headwaters of the Missouri River with the headwaters of the Columbia River (10 U. S. Stats. At Large, 603, Ch. LV, pp. 603-604, Act approved February 6, 1855; 11 U. S. Stats. At Large, 434, Ch. LXXXIII, pp.

431-435; 12 U. S. Stats. At Large, 19, Ch. LVII, p. 19; 1 Sanders History Montana, 279) until the present day when its contributions are greater than ever. By Chapter 10, Laws Extra Session, 1921, pp. 752-760, the State expressly assented to the "Act of Congress approved July 11, 1916," known as the Federal Aid Road Act (*Idem*. Sec. 9, p. 756), has adhered thereto for more than twenty-five years, and currently continues the compact (Sec. 1791, R. C. M. 1935). Montana devotes its state highway fund accruing from the gallonage tax on gasoline to the performance of its obligations under the compact (Sec. 2396.2, R. C. M. 1935, as amended by Chapter 264, Session Laws, 1947).

By the terms of the Federal Aid Act, now called the "Federal Highway Act" (Title 23 U. S. C. A., Secs. 1-41) the state submits road projects to the Secretary of Agriculture, for "primary or interstate or secondary or inter-county highways," and upon approval by him and certification of such approval, the Secretary of the Treasury sets aside the share of the United States, "not exceeding 50 per centum of the total estimated cost thereof," plus additional percentages in a state (such as Montana) containing unappropriated public lands and non-taxable Indian lands (Title 23, U. S. C. A. Sec. 12).

Undoubtedly, Montana may, in a proper case, tax the interstate activity by way of compensation for use of such highways, notwithstanding the Federal government's equal or greater contributions to the facilities and its regulation and supervision of such highways (Title 23, U. S. C. A. Secs. 10, 13 and 19). But the notion that Montana is a sole proprietor of such highways, that Montana alone has borne the burden of their construction, should not lurk in judicial thought during any consideration of "compensation" in this case.

The Federal government's contributions to "state high-

ways" are in aid of the citizens of every state, in aid of Aero as a Kentucky corporation, quite as much as they are in aid of the citizens of Montana and the corporations domiciled therein. The Federal government's contributions are in aid of that national unity which was the principal purpose of the Constitution and without which Montana would enjoy little prosperity.

Respondents' narrow conceptions of state ownership of the "State highways" do not alert us to the existence of the substantial Federal contributions to, and interest in, the very highways, the use of which is denied to Aero until after it pays the taxes demanded. The Congress has not, by the Motor Carrier Act of 1935, as amended (Title 49 U. S. C. A. Sec. 301) relinquished any of its power to protect interstate commerce or removed from the jurisdiction of this court its plenary right to construe the respective powers of Federal and State governments (Title 49 U. S. C. A. Sec. 302) as it has been accustomed to do. On the contrary, the Congress has, by that Act, made clear that the interstate carrier may enjoy his certificate of convenience and necessity in interstate transport without begging the States for such privilege, even though it must pay its way.

The interstate highways in the nation are not multiple deck bridges, with one deck for intrastate traffic and another deck for interstate traffic. There is one continuous roadbed for all to use, in whatever commerce they may be engaged. And the interstate operator has fully as much right to move his vehicle thereon as the local operator, in the presence of the complementary legislation by the Congress and the assenting States.

We continue, then, under the duty to examine and apply the decisions of this Court in the highway compensation doctrine. While the Board in its complaint (R. 3) charged that Aero was not contributing its share of taxes for the construction, maintenance, operation and regulation of the

public highways of the State," it abandoned that charge, and now finally asserts that Aero is not contributing taxes "in consideration of the use of the highways of the State" (Board's Statement Opposing Jurisdiction, pp. 7 and 8). Confronted with the fact that none of the fees were actually devoted to highway maintenance or construction, and that the receipts of both taxes go to the general fund of the State, the Board took refuge in the fact that the statutes levying both taxes did assert in words that they were "in consideration of the use of the highways of this state," and argue that whether the monies were actually expended for highway purposes, is immaterial. The statement that a tax is laid in consideration of use merely provokes inquiry as to the relation between tax and use. In short, the Board's demand on Aero may be paraphrased: "You use the State's highways. You must pay in advance for that use. Pay the Board for the general fund of the State, \$10.00 per truck per year. In addition, pay into the same fund $\frac{1}{2}$ of 1% of your gross operating revenues every quarter during the year. The State is not obliged to account to you for what it does with its general fund. It is enough that you use its highways." This is merely to say, "If you pay the tax, you may use the highways." But such conditional permission does not establish any relation between tax and use; nor does the mention of \$10.00 per vehicle or a percentage of system revenues. They are both meaningless because "use" is not measurable by them in *vacuo*. Presumptions of legislative legitimacy are of no avail when the very statutes in question extinguish them *by ignoring relationship between tax and use*. The doctrine of compensation for use is not observed by merely stating *a fee for a use*.

"... the mere fact that the tax falls upon one who uses the highway is not enough to give it presumptive validity."

Interstate Transit, Inc., v. Lindsey, 283 U. S. 183.

As we view the decisions of this Court on the subject of the right of the State to lay a tax on interstate commerce, its incidents, local activities, or its fruits, there is consistency in majority and minority view in the steady attempt to relate tax and presence in the State, tax and protection afforded by the State, tax and burden to the State, tax and use of State facilities. Montana failed to do this in both the statutes before this Court. There is not a single decision of this Court in the area of compensation for highway use that warrants the thought that reasonably direct and reasonably fair relationship between tax and use *must affirmatively* appear.

Cases Decided Prior to Federal Motor Carrier Act

In *Hendrick v. Maryland* (1915) 235 U. S. 610, the Court had before it Ch. 207 of the Laws of Maryland, 1910, prescribing a registration fee, graduated according to motor horse power, for operating motor vehicles over the highways. In upholding the fee as a valid exercise of the police power, over objections of a resident of the District of Columbia who failed to show compliance with the Acts of Congress providing for registration of motor vehicles in the District, or that he applied for an identifying tag in Maryland giving him limited free use of the highways in Maryland, the Court related amount of charge and method of collection to the standards of reasonableness, uniformity, fairness and practicality. The Maryland statute was not shown to fail these tests and hence constituted no burden on interstate commerce. Any excess of fees over cost of regulation was *applied to the maintenance of improved roads*.

In *Kane v. New Jersey*, (1916) 242 U. S. 160, Chapter 113, Laws of New Jersey, 1906, p. 177, as amended by Chapter 304, Laws of New Jersey, 1908, another motor vehicle regis-

tration act providing license fees graduated according to horse power was attacked by a resident of New York who had been licensed as a driver under the laws of both New York and New Jersey and who had registered his car in New York, but not in New Jersey. While enroute from New York to Pennsylvania, Kane was arrested in New Jersey because he had not registered his car in that State. He challenged on grounds that the New York statute violated the Commerce Clause and the Fourteenth Amendment. His challenge was rejected on the ground that the State's right "is properly exercised in imposing a license fee graduated according to the horse power of the engine" (242 U. S. 160, 167) and any excess in fees over expenses was applied to the maintenance of improved roads. Tax and use were directly related.

In *Clark v. Poor*, (1927) 274 U. S. 554, interstate operators complained of the Ohio Motor Transportation Act of 1923, as amended, (Ohio General Code, Secs. 614-84 to 614-102) on the very broad ground that they were not subject to regulation by the State, including payment of a tax graduated according to the number and capacity of the vehicles used (Secs. 614-87, 614-94). *Payment of a tax was for the maintenance and repair of the highways and for the administration of the Act* (Sec. 614-94). There the statute itself directly related tax to use. There was no reach for extraterritorial revenues.

In *Interstate Busses Corp. v. Blodgett* (1928), 276 U. S. 245, a Connecticut corporation engaged exclusively in interstate commerce, claimed that Ch. 254, Connecticut Public Acts, 1925, imposed an unconstitutional burden on interstate commerce because as to it alone, the statute prescribed an excise tax of one cent for each mile of highway traversed by any motor vehicle in interstate commerce. Eighty per cent of the cost of construction and maintenance of Con-

necticut's highways was collected from registration fees, drivers' licenses and taxes on sales of gasoline. Intrastate operators paid a 3% gross receipts tax, less local taxes on real and personal property. By the very terms of the statute (Part II, Sec. 4) the proceeds are to be applied to the maintenance of the public highways in Connecticut. This Court found that plaintiff failed to show "*that the aggregate charge bears no reasonable relation to the privilege granted.*" Obviously Connecticut's legislators related the interstate tax to use by the mileage device. Montana's legislators refused to do this at any time from 1931 to 1947.

In *Sprout v. South Bend* (1928), 277 U. S. 163, Sprout, who operated a bus between South Bend, Indiana, and Niles, Michigan, refused to pay the license fee prescribed by the City of South Bend, Indiana, for operation of busses over its streets. By the terms of the municipal ordinance, the fee varied with the seating capacity of the bus. The fees were not applied to expense of regulation or for construction or maintenance of the city streets. This Court held the ordinance void. There was no showing of relationship between tax and enforcement or that the tax had been designed as a measure of the cost or value of the use of the highways.

In *Carley & Hamilton v. Snook*, (1930) 281 U. S. 66, intrastate operators objected to Sections 77(b) and (c) of the Motor Vehicle Act of California, 1923 California Statutes, Chapter 266, as amended by 1927 California Statutes, Ch. 844, prescribing registration fees on an elaborate scheme, including factors of weight of vehicle, load, tire equipment, etc. Violation of the Fourteenth Amendment was charged on the ground of multiple taxes. After deductions for the support of enforcement, the statute required the fees to be paid one-half to counties for construction and maintenance of roads; one-half for maintenance of State roads. Hence

there was a relation between tax and use. In passing, this Court pointed out that in cases involving *interstate commerce*, it "may inquire whether the tax bears some reasonable relation to the use of the State facilities by the carrier."

In *Interstate Transit, Inc. v. Lindsey*, (1930) 283 U. S. 183, an Ohio corporation operating exclusively in interstate commerce complained that Chapter 89, Laws of Tennessee, 1927, imposing a tax graduated according to seating capacity of busses, violated the Commerce Clause. The Tennessee Act, like the Montana Statutes, sent the proceeds of the taxes to the General Fund of the State (283 U. S. 183, 188). And in Tennessee, as in Montana, State highways were constructed and maintained by the State Highway Commission out of the State Highway Fund. These conditions moved this Court to declare that the tax was not exacted for construction and maintenance of highways but merely as a privilege tax for carrying on interstate business. This Court further found that the seating capacity device proportioned the tax solely to earning capacity of the vehicle, and said: "• • • there is here no sufficient relation between the measure employed and the extent or manner of use, to justify holding that the tax was a charge made merely as compensation for the use of the highways by interstate busses."

In *Aero Transit Co. v. Georgia Comm.* (1934) 295 U. S. 285, the Motor Carrier Act of Georgia, 1931 (Georgia Laws, Ex. Session 1931, p. 99) was attacked by an interstate operator who objected to a registration and license fee of \$25.00 for every vehicle operated. The fee was payable "as soon as the certificate is issued," and annually thereafter as long as the certificate is in force (Sec. 18). The same section required the fees to be paid into the motor vehicle fund, from which all costs of enforcement and administration were to be paid, and any excess over those requirements

paid to the State Highway Department "for use in maintenance and repair of the highways." This Court thought the fee moderate in amount and emphasized that "*it goes into a fund for the upkeep of highways which carriers must use in the doing of their business.*"

There was thus a direct relationship between fee and facility.

Cases Decided After Federal Motor Carrier Act

In *Morf v. Bingaman* (1936) 298 U. S. 407, this Court reviewed Ch. 56, Laws of New Mexico, 1935, providing flat fees for permits for transportation of motor vehicles on their own wheels for sale or offer for sale, whether driven singly or in processions or caravans. This mode of transport was shown to be singularly burdensome both from wear and tear on highways and policing traffic. The business was shown to be unusual, in a distinct class and of considerable magnitude. Chapter 56, Laws 1935, was an amendment of Ch. 139, Laws of New Mexico, 1933, which, in turn, amended Ch. 119, Laws of New Mexico, 1929. The proceeds were divided after deducting 6% for enforcement, between the State Road Fund, County Road Funds, State General Fund and County, City and School Districts (Ch. 119, Laws of New Mexico, 1929, p. 266). This Court found the tax "*not on the use of highways,*" but for the purpose of enabling the State to police such extraordinary traffic. The processional cars did not receive State licenses or license plates.

In *Ingels v. Morf* (1937), 300 U. S. 290, this Court annulled the California Caravan Act (Cal. Stat. 1935, C. 402) imposing a fee of \$15.00 on each vehicle moving in caravan under a special permit. The Court pointed out that by explicit declaration of the act, the proceeds from the fees were to reimburse the State Treasury for the cost of polic-

ing the traffic, concluded that this negatived any tax-highway use relation, and found the fee excessive for policing purposes. In the same year, the California Legislature substituted a new statute which was upheld in *Clark v. Paul Gray, Inc.*, 306 U. S. 583.

In *Dixie Ohio Co. v. Commission* (1939), 306 U. S. 72, an interstate carrier complained of the Georgia Maintenance Tax Act (No. 376, Laws of Georgia, 1937, p. 155) which set up an elaborate system of taxes on all classes of motor vehicles, graduated as to vehicles carrying property, on a weight basis. Vehicles for which the taxes were paid were required to affix and carry a "Maintenance Tag" and all the moneys derived from the sales of the tags were allocated to the State Highway Department for expenditure on roads (Sec. 11, p. 166). This Court said the language of the act disclosed the intention of the State to require compensation for road use. No proof was made showing that the fee was unreasonable in amount. Tax and use of roads were related on the basis of maintenance. Whether the operation used the very stretches of road benefitted, was immaterial.

McCarroll v. Dixie Lines (1940), 309 U. S. 176, is the last case from this Court which has come to our attention. There, an operator of an interstate passenger bus resisted application of an Arkansas Statute making applicable the general excise tax of 6½ cents per gallon of motor fuel to every company driving into the state a motor vehicle carrying over twenty gallons of gasoline in its tank. This Court found that a fair charge for use of the highways could have no reasonable relation to the reserve gasoline in tank. The concurring opinion stressed that it "must appear on the face of the statute or be demonstrable that the tax as laid is measured by, or has some fair relationship to the use of the highways for which the tax is laid." The

tax was used exclusively for highway purposes. But even that general relationship did not give the tax the necessary admeasurement. The concurring opinion said:

"In no case does it appear that the amount of taxed gasoline has any relation to the size or weight of vehicles. The last expression from this Court requires not only relationship between tax and use but admeasured relationship between tax and use."

VII. The Judgment of the Supreme Court of Montana, as to Both Taxes, Must Be Reversed

1. The Montana Supreme Court determined that both the \$10.00 per vehicle tax and the $\frac{1}{2}$ of 1% gross revenue tax apply to Aero Mayflower Transit Co., operating exclusively in interstate commerce. The Court rested its decision on its statement,—

"The revenue collected is devoted to the building, repairing and policing of such highways, and that which the State furnishes is an aid, not a burden to interstate commerce" (R. 118-119).

Since this statement is completely erroneous in fact, the opinion of the State court fails for want of its asserted premise.

2. The substitute or alternative premise for the State court's opinion offered by the Board, i.e., reiteration of the statutory language that each tax is imposed "in consideration of the use of the public highways of this State" disappears in the presence of the action of the Legislative Assembly of Montana in appropriating the proceeds from the start to purposes foreign to highway use and finally seizing the fees for the General Fund of the State.

3. The statutory statement of consideration is without even presumptive force in the presence of the Legislature's express rebuttal of it.

4. In any event, this Court has consistently insisted that those who seek, by such self serving statutory announcements, to lay a tax on a transportation company exclusively engaged in interstate commerce—an area that may be reserved from State action entirely—affirmatively demonstrate that the exaction is not for the privilege of doing interstate commerce, that it is fair, that it is non-discriminatory, and that the tax, assertedly laid for use of highways, bear an actual relationship to use.

5. In the presence of these principles, both taxes here asserted are void because,—

(1) the flat \$10.00 per vehicle tax is conceived in hostility to interstate commerce in that it conditions the right to carry on such commerce in Montana on a "permit" to be issued by the Board on condition of payment of the tax initially in advance and annually in advance for successive annual periods; in that it affirmatively appears that the legislature has prevented use of the proceeds not only for highway construction and maintenance but for enforcement of the Motor Carrier Act, as well; in that the provision for liens and executions on interstate vehicles imperil interstate commerce every hour and every mile in Montana; and the attempt of the Board in this action physically to stop interstate commerce, and the Montana Court to enjoin the operation, demonstrate the hostile intent of the law; and that the flat tax bears no relation to interstate use;

(2) the gross revenue tax was manifestly enacted without care in the light of the provision confiding its enforcement to the Public Service Commission instead of the Board of Railroad Commissioners; in that it affirmatively appears that the legislature has negated any presumption of use of proceeds for highway purposes or administrative enforcement; in that it is emphatically and repeatedly, ad-

dressed to all the gross operating revenues of the carrier; in that the "construction" of the Supreme Court of Montana that the tax is laid on some proportion of interstate revenues derived by an unknown formula is rejected by the very words of the statute; in that there is neither apportionment, nor rule for apportionment; in that it is aggressively extra-territorial in operation, and subjects the interstate carrier to multiple burdens not borne by the intrastate carrier;

(3) that the evident carelessness in legislative draftsmanship of both taxes, in the presence of a myriad of tried legislative precedents logically leads to the conclusion that the law makers were not mindful of the limitations on State power, and interstate commerce must, at a minimum, be protected from the uncertainties, and the risks consequent on the Board's offer to make the gross revenue statute valid by ignoring its invalidity.

Conclusion

It is submitted that both statutory taxes are void for conflict with the Constitution of the United States, as alleged in the Cross-Complaint of Aero, and that the judgment of the Supreme Court of Montana must be reversed, with directions to enter judgment for appellant.

EDMOND G. TOOMEY,
EMMET S. HUGGINS,
Attorneys for Appellant.

Helena, Montana.

September 13th, 1947.

ADMISSION OF SERVICE

Service of the foregoing Brief of Appellant, and receipt of a true copy thereof is hereby admitted at Helena, Montana, this 15th day of September, 1947.

R. V. BOTTOMLY, ESB,

Attorney General of the State of Montana,

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sioners of the State of Montana,*

Attorneys for Appellees.

APPENDIX NO. 1

The "Flat" \$10.00 Per Vehicle Tax Statute

(Originally enacted as Sections 16 and 17 of Chapter 184, Laws of Montana, 1931; now found as Sections 3847.16 and 3847.17 Revised Codes of Montana, 1935, at pages 688 and 689 of Volume 2 (Political Code) Revised Codes of Montana, 1935).

"3847.16. Annual fee for motor carriers—fee for seasonal operators—compliance required of motor carriers operating in more than one state—revocation of certificate for failure to pay fees—lien of fees and charges.

(a) In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of the public highways of this state, every motor carrier, as defined in this act, shall, at the time of the issuance of a certificate and annually thereafter, on or between the first day of July and the fifteenth day of July, of each calendar year, pay to the board of railroad commissioners of the state of Montana the sum of ten dollars (\$10.00), for every motor vehicle operated by the carrier over or upon the public highways of this state.

Provided, that a motor carrier engaged in seasonal operations only, where its said operations do not extend continuously over a period of not to exceed six (6) months in any calendar year, shall only be required to pay compensation and fees in a sum equal to one-half ($\frac{1}{2}$) of the compensation and fees herein provided, and, provided further, that the compensation and fees herein imposed shall not apply to motor vehicles maintained and used by a motor carrier as standby or emergency equipment. The board shall have the power and it is hereby made its duty to determine what motor vehicles shall be classed as standby or emergency equipment.

(b) When transportation service is rendered partly in this state and partly in an adjoining state or foreign

country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state.

(c) Upon the failure of any motor carrier to pay such compensation, when due, the board may in its discretion revoke the carrier's certificate or privilege and no carrier whose certificate or privilege is so revoked shall again be authorized to conduct such business until such compensation shall be paid.

(d) All compensation, fees, or charges, imposed and accruing under the provisions of this act, shall be a lien upon all property of the motor carrier used in its operations under this act; said lien shall attach at the time the compensation, fees, or charges become due and payable, and shall have the effect of an execution duly levied on such property of the motor carrier and shall so remain until said compensation, fees, or charges are paid or the property sold for the payment thereof.

• History: En. Sec. 16, Ch. 184, L. 1931."

"3847.17. *Motor carrier fund — composition — use.* All of the fees and compensation charges collected by the board under the provisions of this act shall be transmitted to the state treasurer who shall place the same to the credit of a special fund designated as 'motor carrier fund'; such fund shall be available for the purpose of defraying the expenses of administration of this act and the regulation of the businesses herein described, and shall be accumulative from year to year. All expenses of whatsoever kind or nature of the board incurred in carrying out the provisions of this act shall be audited by the state board of examiners and paid out of the 'motor carrier fund.' Such

fund shall not come within the restriction of any law of this state governing payment of expense incurred in a previous year, it being intended that such fund shall be applied to the payment of any necessary costs or expenses in carrying out the provisions of this act, whether incurred during the ensuing year or previous fiscal years, and such 'motor carrier fund' or accumulations thereof, are hereby appropriated for the payment of the costs and expenses rendered necessary in the carrying out of the provisions of this act.

History: En. Sec. 17, Ch. 184, L. 1931."

APPENDIX NO. 2

The Statute Imposing Tax of $\frac{1}{2}$ of 1% on Gross Operating Revenue (Before Amendment)

NOTE: *The text quoted below is the text as it existed prior to amendment on February 19, 1947, after appeal in No. 39, October Term, 1947.*

(Originally enacted as Sections 27 and 28 of Chapter 100, Laws of Montana, 1935; now found as Sections 3847.27 and 3847.28 Revised Codes of Montana, 1935, at Pages 691 and 692 of Volume 2 (Political Code) Revised Codes of Montana, 1935.)

"3847.27. *Additional fees concerning motor carriers.*

In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall between the first and fifteenth days of January, April, July and October of each year, file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one per cent of the amount of such gross operating revenue; provided,

however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars (\$30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars (\$15.00)."

History: En. Sec. 2, Ch. 100, L. 1935.

"3847.28. *Disposition made of fees.* All fees collected from motor carriers shall be, by the commission, paid into the state treasury and shall be, by the state treasurer, placed to the credit of the motor carrier fund. All other fees and charges collected by the commission under the provisions of this act shall be by the commission paid into the state treasury and shall be by the state treasurer placed to the credit of a fund to be known as the 'public service commission fund,' and the general and contingent expenses of the public service commission shall be by the state treasurer paid out of said public service commission fund upon presentation of duly verified claims therefor, which claims shall have been approved by the commission and audited by the state board of examiners."

History: En. Sec. 3, Ch. 100, L. 1935.

APPENDIX NO. 3

THE STATUTE IMPOSING TAX OF $\frac{1}{2}$ OF 1% ON GROSS OPERATING REVENUE (AFTER AMENDMENT)

Note: The text quoted below is the text as it was amended by Chapter 73, Laws of Montana, 1947, approved February 19th, 1947, and made effective "from and after its passage and approval," some two months after the appeal herein was perfected on December 16th, 1946.

(Enacted as Chapter 73, Laws of Montana, 1947, approved and effective on February 14, 1947, now found as an uncodi-

fed session law of the Thirtieth Legislative Assembly of Montana 1947, at pages 88-90, Laws of Montana, 1947).

CHAPTER 73

An Act to Amend Sections 3847.26 and 3847.27 of the Revised Codes of Montana, 1935, Relating to Fees and Charges to Be Made By the Board of Railroad Commissioners and the Public Service Commission of Montana; and Reports to Be Made by Certified Motor Carriers, and the Fees to Be Paid By Them in Connection With the Regulation of Such Carriers.

Be it enacted by the Legislative Assembly of the State of Montana:

Section 1. That Section 3847.26 of the Revised Codes of Montana, 1935, be and the same is hereby amended to read as follows:

3847.26. Fees Required for Filing Various Documents. The board of railroad commissioners and the public service commission of Montana shall, except as otherwise provided by law, require and receive fees before filing any annual reports, tariffs, schedules and supplements thereof and shall require and receive fees for all copies of orders, documents, classifications, blank forms and other instruments prepared by it or on file in the office thereof, except as otherwise provided by law to be furnished free of charge, in accordance with the following:

Filing annual reports, each	\$5.00
Filing tariffs, time schedules and supplements thereto, each	2.00
For issuing certificates of public convenience and necessity to motor carriers, each,	2.00
Classification for public utilities, each,	1.50
Classification for motor carriers, each,	.50
For copy of rules and regulations for motor carriers, each,	.25
Blank forms of annual reports for utilities and common carriers	Cost.

"Nothing herein contained shall be construed to require or authorize *the board of railroad commissioners or the public service commission* to collect fees for the filing of any annual reports, tariffs, schedules and supplements thereof which relate solely to interstate commerce."

Section 2. That Section 3847.27 of the Revised Codes of Montana, 1935, be and the same is hereby amended to read as follows:

"3847.27. *Additional Fees Covering Motor Carriers.* In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity or permit issued by the *board of railroad commissioners*, shall between the first and fifteenth days of January, April, July and October of each year, file with the *board of railroad commissioners* a statement showing the gross operating revenue of such carrier for the preceding three (3) months of operation, or portion thereof, and shall pay to the board a fee of one-half of one (1) per cent of the amount of such gross operating revenue; and in the event that such carrier operates in interstate commerce, the gross operating revenue of such carrier within this state shall be deemed to be all the revenue received from business beginning and ending within this state, and a proportion based upon the proportion of the mileage within this state to the entire mileage over which the business is done of revenue on all business passing through, into or out of this state; provided, however, that the minimum fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars (\$30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars (\$15.00)."

Section 3. All acts or parts of acts in conflict herewith are hereby repealed.

Section 4. This act shall be in full force and effect from and after its passage and approval.

Approved February 19, 1947.

APPENDIX NO. 4**USE OF TAX PROCEEDS BY LEGISLATURE**

1933

Railroad and Public Service Commission**From the Revolving, or Motor Carrier Fund:**

For salaries, for other operation, . . . "provided that any additional money remaining in this fund shall be used to pay that portion of operating expenses as set forth under the Railroad and Public Service Commission." (Sic).

House Bill No. 337, Laws of Montana, 1933, pp. 513, 515.

1935

Railroad and Public Service Commission**From the Motor Carrier Fund:**

"All fees and collections for salaries and expenses as provided for in Chapter 184, Session Laws of 1931."

(Motor Carrier Act) House Bill No. 491, Laws of Montana, 1935, pp. 480, 484.

1987

Railroad and Public Service Commission**From the Motor Carrier Fund:**

"All fees and collections for salaries and expenses as provided for in Section 3847.17 Revised Codes of Montana, 1935."

House Bill No. 246, Laws of Montana, 1937, p. 644, 648.

1933

Railroad and Public Service Commission

"In addition thereto, there is hereby appropriated all monies of the motor carrier fund and the gasoline inspection

fund as may be necessary in carrying out all the duties of the railroad and public service commission."

House Bill No. 410, Laws of Montana, 1939, pp. 661, 663.

1941

In this year, by Section 2 of Chapter 16, Laws of Montana, 1941, pp. 16-18, all moneys collected by the Board were paid to the State Treasurer for credit to the general fund of the State. Appropriations "for the purpose of carrying out all of the functions and duties of the railroad commission, the public service commission," etc., were made out of the general fund.

House Bill No. 106, Laws of Montana, 1941, pp. 366, 369, 370.

1943

In this year, appropriations were made out of the General Fund for salaries, operation, etc., of the "Railroad Commission" from the General Fund.

House Bill No. 95, Laws of Montana, 1943, pp. 516, 519, 520.

1945

The 1943 appropriation procedure was followed in 1945.

House Bill No. 108, Laws of Montana, 1945, pp. 555 and 559.

1947

And again in 1947.

House Bill No. 260, Laws of Montana, 1945, pp. 714, 717, 718.

Transfer of Motor Carrier Fund To State General Fund

Section 2 of Chapter 14, Laws of Montana 1941, pp. 16-21:

"Section 2. That all moneys collected or received by or paid over to the board of railroad commissioners of Montana, public service commission of Montana, state board of health, milk control board, state auditor and insurance commissioner ex-officio, under the pro-

visions of Section 2761, Revised Codes of Montana, 1935, department of agriculture, labor and industry, or any of the bureaus, divisions, officers or employees of any thereof, and to the state examiner and state forester, by way or on account of fees, licenses, or for any other purpose, on and after July 1, 1941, shall be paid over to the state treasurer who shall deposit the same to the credit of the general fund of the state."

- Section 4 of Chapter 14, Laws of Montana, 1941, pp. 18-19:

"Section 4. Any and all balances remaining in any fund or funds established, created, kept or maintained in the state treasurer's office for any of the license or tax laws, specifically mentioned in Section 1 of this act, or for any of the departments, or bureaus, or divisions thereof, or for any of the officers specifically mentioned in Section 2 of this act, or for any of the institutions or departments thereof specifically mentioned in Section 3 of this act, at the close of the fiscal year ending July 1, 1941, shall be, by such state treasurer, immediately after the close of such fiscal year, transferred to and shall become a part of the state general fund, excepting moneys for school purposes which under existing law may not be apportioned or distributed until after July 1, 1941."

Section 10 of Chapter 14, Laws of Montana, 1941, pp. 20-21:

"Section 10. That Sections 2295.28, 2303.12, 2355.9, 2408.9, 2815.157, 3645, 10400.44, 10400.49 Revised Codes of Montana 1935, Section 29 Chapter 84, Section 7 of Chapter 91, Subsection 1 of Section 11 of Chapter 87, Section 9 of Chapter 94, Section 11 of Chapter 199 and Section 7 of Chapter 201 Session Laws of Montana 1937; and all other acts and parts of acts in conflict herewith are hereby repealed; it being the purpose and intent of this act that the licenses, fees, taxes and revenues specifically enumerated and described in Sections 1, 2 and 3 of this act shall be deposited by the state treasurer to the credit of the state general fund

and that no money shall be drawn from such fund but in pursuance of specific appropriations made by law, in conformity with the provisions of Section 10 of Article XII of the Constitution of the State of Montana."

Section 10 of Article XII of the Constitution of Montana provides:

"Sec. 10. All taxes levied for state purposes shall be paid into the state treasury, and no money shall be drawn from the treasury but in pursuance of specific appropriations made by law."

APPENDIX NO. 5

Additional Montana Taxes Paid by Interstate Motor Carriers

Registration and License Plate Tax

Section 1759 R. M. C., 1935, as amended by Chapter 72, Laws of 1937, pp. 123-126, in current text:

Section 1. That Section 1759, Revised Codes, Montana, 1935, shall be, and the same is hereby amended to read as follows:

1759. *Application for Registration of Motor Vehicles and Payment of License Fees Thereon.* Every owner of a motor vehicle operated or driven upon the public highways of this state shall, for each motor vehicle owned, except as herein otherwise expressly provided, file, or cause to be filed, in the office of the county treasurer of the county wherein such motor vehicle is owned or taxable, an application for registration, or re-registration, upon blank form to be prepared and furnished by the registrar of motor vehicles, executed in duplicate, which application shall contain:

(1) Name and address of owner, giving county, school district, and town or city within whose corporate limits the motor vehicle is taxable.

(2) Name and address of conditional sales vendor, mortgagee or holder of other lien against said motor vehicle, with statement of amount owing under such contract or lien.

(3) Description of motor vehicle, including make, year model, engine and serial number, manufacturer's model or letter, weight, type of body and, if truck, the number of tons.

(4) In case of re-registration, the license number for the preceding year.

(5) Such other information as the registrar of motor vehicles may require.

Before filing such application with the county treasurer, the applicant shall submit the same to the county assessor of said county and said county assessor shall enter on said application in a space to be provided for that purpose, the full and true and the assessed valuation of said automobile for the year for which said application for registration is made.

The applicant shall, upon the filing of said application, (1) pay to the county treasurer the registration fee, as provided in Section 1760 Revised Codes of Montana, 1935, and shall also at such time (2) pay the taxes assessed against said motor vehicle for the current year of registration (unless the same shall have been theretofore paid for said year) before the application for registration or re-registration may be accepted by the county treasurer. The county treasurer is hereby empowered to make full and complete investigation of the tax status of said vehicle and any applicant for registration or re-registration must submit proof with respect thereto from the tax records of the proper county at the request of the county treasurer; provided, that nothing herein shall be deemed to conflict with the provisions of Section 1756.6 Revised Codes of Montana, 1935, and the provisions hereof shall be construed in connection therewith.

The amount of taxes on said motor vehicle shall be computed and determined by the county treasurer on the basis of the levy of the year preceding the current year of applica-

tion for registration or re-registration and such determination shall be entered on the application form in a space provided therefor.

Motor vehicles are hereby declared to be assessable for taxation as of and on the first day of January in each year irrespective of the time fixed by law for the assessment of other classes of personal property, and irrespective of whether or not the levy and tax may be a lien upon real property within the State of Montana, provided that in no event shall any motor vehicle be the subject of assessment, levy and taxation more than ~~once in each year~~, viz., the first day in January in each year, which shall be the time of assessment for tax purposes of motor vehicles in stock, in dealers' possession or in dead storage, as well as in use, subsequent registrations, if any, of the same vehicle in the same year not being subject to payment of taxes.

The applicant for original registration of any wholly new and unused motor vehicle acquired by original contract after the first day in January of any year, and such vehicle shall not be subject to assessment and taxation for said vehicle until the first day in January of the year next succeeding, but nothing herein contained shall exempt such vehicle from taxation in the possession of any person on said assessment date.

Upon accepting application for registration or re-registration of any motor vehicle which is subject to taxation in this state on January 1st in any year, and upon payment of taxes, the county treasurer shall stamp on said application: 'Taxes on this vehicle due January 1st of current year paid by applicant, prior applicant or owner and this vehicle is eligible for registration.'

Upon accepting application for registration of any motor vehicle which was not subject to taxation in this state on January 1st in any year, the county treasurer shall indicate such fact by proper entry on said application.

The registrar of motor vehicles shall have authority to make proper entry on any certificate of title to any motor vehicle respecting payment of taxes in accord with the fact.

Section 1759.3, R. C. M. 1935, as amended by Chapter 72, Laws 1937, Chapter 154, Laws of 1943, and in current text by Chapter 200, Laws of 1945, pp. 464-465:

Section 1. That Section 1759.3 of the Revised Codes of Montana for 1935, as amended by Chapter 72 of the Laws of the twenty-fifth legislative assembly of the State of Montana for 1937, and all other acts amendatory thereof be and the same is hereby amended to read as follows;

Section 1759.3. Disposition of Taxes and License Fees Collected and Method of Payment of Expenses of Costs of Making and Delivering License plates and Identification Marks, Certificates and All Other Expense of Operating the Motor Vehicle Department. The county treasurer shall credit all taxes on motor vehicles so collected to a motor vehicle suspense fund and, at some time between March 1 and March 10 of each year, and every sixty (60) days thereafter, the county treasurer shall distribute the same in relative proportions required by the levies for state, county school district and municipal purposes in the same manner as other personal taxes are distributed. All motor vehicle license fees collected by the county treasurer for vehicle license fees collected by the county treasurer shall be credited to the motor vehicle license fund hereby established. The cost of making and delivering license plates and identification marks, certificates, and all other expense of operating the motor vehicle department of the State of Montana, shall be paid out of the motor vehicle recording fund (sometimes called the motor vehicle administrative fund); provided, however that each county shall receive its pro-rata share of any license fees, except dealer license fees, paid to the registrar of motor vehicles. The remainder in said county motor vehicle license fund shall be transferred by the county treasurer at the end of each month to the road fund of said county and shall be used by the county for the purpose set forth in Section 1760."

Section 1760, R. C. M. 1935, as amended by Chapter 154, Laws of 1943, and by Chapter 200, Laws of 1945, pp. 465-470,

in current text, omitting non-applicable schedules and other non-applicable matter:

“Section 1760. Registration Fees of Motor Vehicles—Fees—Disposal of Proceeds—Fee for Half Year—Dealers’ Registration and Transfer Thereof—Public Owned Vehicles Exempt From License or Registration Fees—License or Registration Fees for Trailers and Semi-trailers and Tractors, and Defining Same—Providing for Transfer of Funds From the Motor Vehicle Fund of the Registrar of Motor Vehicles to the Motor Vehicle Recording Fund (Sometimes Called the Motor Vehicle Administrative Fund)—Providing for Deposit of All Fees, Other Than License Fees, Except Dealer License Fees, Collected by the Registrar of Motor Vehicles, in Said Motor Vehicle Recording Fund for the payment of the Registrar of Motor Vehicles; Registration or License Fees Shall Be Paid Upon Registration or Re-registration of Motor Vehicles or Automobile Accessories in Accordance With This Act, as Follows:

Motor vehicles, weighing twenty-eight hundred and fifty (2850) pounds, or under, other than motor trucks, five (\$5.00) dollars;

Motor vehicles, weighing over twenty-eight hundred and fifty (2850) pounds, other than motor trucks, ten (\$10.00) dollars;

Tractors and/or trucks of one (1) ton capacity or under, five (\$5.00) dollars;

Tractors and/or trucks over one (1) ton and up to and including one and one-half (1½) tons capacity, ten (\$10.00) dollars;

Tractors and/or trucks over one and one-half (1½) tons and up to and including two (2) tons capacity, twenty-two dollars and fifty cents (\$22.50);

Tractors and/or trucks over two (2) tons and less than three (3) tons capacity, thirty-seven dollars and fifty cents (\$37.50);

Tractors and/or trucks of three (3) tons and less than five (5) tons capacity, sixty (\$60.00) dollars;

Tractors and/or trucks of five (5) tons capacity and over, two hundred (\$200.00) dollars; provided that tractors shall not be construed as meaning farm tractors used on farms or tractors used solely in logging operations but only such tractors as are part of a unit to haul over the highways;

Busses shall be classed as motor trucks and licensed accordingly;

All rates to be twenty-five per cent (25%) higher for motor vehicles, trailers and semi-trailers, when not equipped with pneumatic tires;

All license or registration fees collected by the county treasurer of the county in which any motor vehicle is registered shall be credited to the motor vehicle license fund of said county. The funds in said county motor vehicle fund shall be used as follows:

(a) Fifty per cent (50%) of the net license fees derived from the registration of motor vehicles, the owners of which reside within the boundaries of any incorporated city of the State of Montana, having a population of thirty-five thousand (35,000) or more, according to federal census of 1930, and twenty-five per cent (25%) of the net license fees derived from the registration of motor vehicles, the owners of which reside within the boundaries of any city in the State of Montana having a population of ten thousand (10,000) or more, according to the federal census of 1940, and which city is situated in a county which has an area of less than seven hundred and fifty square miles, shall be held by county treasurer and segregated from other county road funds and be designated as 'city road fund,' to be used in city from which fees were derived for the construction of permanent streets within the incorporated limits of such city.

(b) The license fees held in the city road fund, as hereinabove provided, *at the end of each thirty (30) day period beginning March 1, 1945, be paid by the county treasurer to the city treasurer to be held by such city treasurer in a separate fund designated as the 'city road fund'*, shall be used by the city council of such city having the population of thirty-five thousand (35,000), or more, according to the federal census of 1930, *or by the city council of such city having a population of ten thousand (10,000), or more, according to the federal census of 1940 and situated in a county which has an area of less than seven hundred and fifty (750) square miles, only for the construction of permanent highways and streets within the boundaries of such incorporated city.* Provided, that all construction of public highways and streets, the cost of which is to be paid out of the fund derived from the license fees as herein provided, shall be under the supervision of the county surveyor of the county within whose boundaries such city is situated, subject to the control of the said city council and surveyor to designate the public highway or street upon which the work is to be done and the type of pavement to be used, and provided further, that the cost of supervision of the county surveyor shall not exceed five percent (5%) of the cost of said work.

(c) The net license fees derived from the registration of motor vehicles shall be by the registrar of motor vehicles transmitted to, and paid over to the county treasurer of the county from which the registration fee came, such fees excepting apportionment to city road fund, to be used by said county for the construction, repair and maintenance of all public highways, except state and federal highways, within the boundaries of said county, including streets forming component parts of arterial highways within the corporate cities of less population than thirty-five thousand (35,000), according to the federal census of 1930, *other than any corporate city entitled to receive or expend the 'city road fund', within the boundaries of said county.*

All fees, other than license fees, mentioned and described in Section 1758.3 and 1758.4, both as amended by Chapter 72 of the Laws of the twenty-fifth legislative assembly of the State of Montana for 1937, and all other acts amendatory to either of such sections, and in Section 1763.3 of the Revised Codes of Montana for 1935, shall hereafter be deposited in, and paid into, the motor vehicle recording fund of said registrar (sometimes called the motor vehicle administrative fund), out of which shall be paid all salaries, operating expenses, and all other expenses of the department of the registrar of motor vehicles.

There shall be immediately transferred from the motor vehicle fund of the registrar of motor vehicles to the said motor vehicle recording fund all moneys now in said motor vehicle fund which were collected by the registrar of motor vehicles as fees other than license fees.

Whenever, in the judgment of the state board of examiners, there shall be in said motor vehicle recording fund more moneys than are reasonably required or needed to pay all salaries, operating expenses, and all other expenses of the department of the registrar of motor vehicles, such board shall distribute such unneeded surplus or excess to the fifty-six (56) counties of the state in a pro-rata manner based upon the total number of motor vehicles registered in each county."

And see the companion measure, Chapter 201, Laws of 1945, pp. 470-476.

Gasoline License Tax

The Gasoline License Tax of five cents per gallon is an occupation tax imposed on distributors of gasoline by Section 2381.10, R.C.M. 1935, originally enacted as Section 9, Chapter 95, Laws of 1931, and continued in force by successive legislative enactments through Chapter 39, Laws of Montana, approved by the people as Referendum Measure No. 49, 1945, pp. 74 to 86, currently in force. The proceeds of the tax have, since at least 1931, been continuously

pledged to the payment of debentures issued under State Highway Treasury Anticipation Debenture Acts for construction and improvement of state highways under the Federal Aid Highways System.

State ex rel. Diederichs v. State Highway Commission, 89 Mont. 205, 296 Pac. 1033;

Arps v. State Highway Commission, 90 Mont. 152, 300 Pac. 549;

Martin v. State Highway Commission, 107 Mont. 603, 88 Pac. (2nd) 41;

Pioneer Motors v. State Highway Commission — Mont. —, 165 Pac. (2nd) 796.

In reality, the tax is paid by the purchaser at the time he buys gasoline for his car or truck from a vendor's pump or tank in Montana, the purchase price including the tax. The tax is collected by the State Board of Equalization under the provisions of Section 2381.10, R.C.M. 1935, and Section 10 of Chapter 39, Laws of Montana, 1945. The proceeds are disposed of in accordance with law, as follows:

Section 2381.22, R.C.M. 1935:

“2381.22. *Distribution of proceeds of tax—funds.*

All money received by the state treasurer in payment of license taxes under the provisions of this act shall be deposited and credited (a) seventy-five per centum (75%) to the state highway fund, and (b) twenty-five per centum (25%) to a special fund designated as ‘gasoline license drawback fund.’

All money so collected and deposited in the gasoline license tax drawback fund shall be used for the purpose of making such refunds and paying such drawbacks as are authorized by law to be made or paid to purchasers of gasoline used in this state for other purposes than the propulsion of motor vehicles over the public highways and streets of this state, provided, however, that at the close of each fiscal year, the state treasurer shall transfer all money remaining unexpended in said gasoline license tax drawback fund to the state highway fund; provided, further, that if at any time the money in said gasoline license tax drawback

fund is insufficient in amount to pay duly authorized and approved refunds or drawbacks, the state treasurer shall transfer from the state highway fund a sum or sums sufficient in amount to meet and pay all such outstanding authorized and duly approved refunds or drawbacks;

All moneys so collected and deposited or transferred to said state highway fund shall be used and expended by the state highway commission in the construction, reconstruction, betterment, maintenance, administration and engineering on the federal highway system of highways in this state selected and designated under the provisions of the federal aid act, approved July 11, 1916, and the federal highway act, approved November 9, 1921, and all amendments thereto, and for the purpose of construction, reconstruction, betterment, maintenance, administration and engineering of highways leading from each county seat in the state to said federal highway system of federal aid roads where such county seat is not on said system, and for the purpose of construction, reconstruction, betterment, maintenance, administration and engineering of such other roads as have been or may be authorized by the laws of Montana, for the collection and enforcement of this act; provided, that the total cost to the state of administration and engineering on the federal aid work contemplated by this act shall not exceed for any fiscal year eight per centum (8%), of the total of state, federal aid and other available funds expended under the supervision of the state highway commission."

Sections 9 and 10 of Chapter 39, Laws of 1945, pp. 84 and 85, provide as follows:

"Section 9. The license tax of five (5¢) cents a gallon of gasoline on dealers or distributors, provided for in initiative measure No. 41 as amended by chapter 30 of the laws of the twenty-sixth legislative assembly of the State of Montana of 1939, and all gallonage taxes on dealers and distributors of gasoline imposed by prior laws, shall be repealed on the date on which

the state treasurer shall have placed in the state highway treasury anticipation debenture interest and redemption fund of 1938 moneys which, when added to the balance in said fund, shall be sufficient to redeem all outstanding state highway treasury anticipation debentures issued under the authority of initiative measure No. 41, as amended by chapter 30 of the laws of the twenty-sixth legislative assembly of the State of Montana for the year 1939.

Section 10. For the purpose of providing funds for the payment of the interest upon and maturing principal of the state highway treasury anticipation debentures herein provided for, every dealer as referred to and defined in the gasoline license tax laws of the State of Montana now in effect, from and after the time when the repeal of the tax provided in initiative measure No. 41 as amended shall become effective as hereinabove provided, until the principal and interest of all debentures issued under the authority of this act shall have been paid, shall pay to the state board of equalization, for deposit in the state treasury, a license tax for the privilege of engaging in and carrying on such business in this state, in an amount equal to five (5¢) cents for each gallon of gasoline (as defined in Section 2381.11 Revised Codes of Montana 1935), refined, manufactured, produced or impounded by such dealer, and distributed, used or sold by him in this state, or shipped, transported or imported by such dealer into and distributed, used or sold by him within this state, after it has arrived in and is brought to rest within this state, whether sold in the original packages or in broken packages; provided that all gasoline delivered by any dealer to any of his own service stations in this state shall be deemed to have been sold, and shall be treated and considered as sold, in computing such license tax, in the same manner as though the same had been sold to other persons. In making the computation of license tax due and in making payment thereof, two per cent (2%) of the amount of such tax shall be deducted by the

dealer as an allowance for evaporation and other loss of gasoline handled by such dealer. No gasoline used or sold by such dealer, which was purchased by him from a dealer who has paid the tax thereon, shall be included or considered in determining the amount of such license tax to be paid by such dealer, and no gasoline exported by such dealer out of the State of Montana shall be included in the computation of any dealer's license tax herein provided for."

Section 2396.2, R.C.M. 1935, as amended by Section 1, Chapter 264, Laws of Montana, 1947, p. 504:

"Section 2396.2. *Use of State Highway Fund on Federal Highway System.* All moneys of the state highway fund, including moneys arising from the license tax upon dealers in gasoline and motor fuels, but excluding moneys being held in such fund for refund or drawback purposes and expense of collection and enforcement; shall be used and expended by the state highway commission in the construction, reconstruction, betterment, maintenance, administration and engineering on the federal highway system of highways in this state selected and designated under the provisions of the federal aid act, approved July 11, 1916, and the federal highway act approved November 9, 1921, and all amendments thereto, and for the purpose of construction, reconstruction, betterment, maintenance, administration and engineering of highways leading from each county seat in the state to said federal highway system of federal aid roads where such county seat is not on said system, and for the purpose of construction, reconstruction, betterment, maintenance, administration of such other roads as have been or may be authorized by the laws of Montana. Provided, that the total net costs to the state for administration on the federal aid work contemplated by this act shall not exceed for any fiscal year eight per cent (8%) of the total of state, federal aid and other available funds expended under the supervision of the state highway commission. It shall be the duty of the state highway

commission, in expending such money, to carry forward construction from year to year, using the money expended through the matching up of federal aid allotments to Montana upon the said federal highway system of highways in the various parts of the state in proportion to the amount of mileage still to be constructed in the various sections of that system as defined in Section 2396.1; provided that nothing in this act shall be construed to conflict with said federal aid highway acts and the rules by which they are administered. *The state highway commission is authorized to enter into co-operative agreements with the national park service and the public roads administration for the purpose of maintaining national park approach roads in Montana.*

The state highway fund referred to in the foregoing sections is established by Section 1799, R.C.M. 1935, in text as follows:

"1799. State highway fund and trust fund. For the purpose of carrying out the provisions of this act, there is hereby created a state highway fund and a state highway trust fund. The state highway fund shall be credited with all moneys received for the use and purpose of the state highway commission from the receipt or transfer of motor vehicle license fees, as provided by law, or from other sources except as herein provided. The state highway trust fund shall be credited with all moneys received from the counties, and from the federal government or other agencies for expenditure by the commission in connection with the actual construction of specific projects. All moneys in the hands of any state officer on the first day of April, 1921, shall be segregated by such state officer and credited to the respective fund to which it properly belongs as above defined. Hereafter all moneys collected for the state highway fund or the state highway trust fund as authorized by law shall be credited to such fund or funds by the state treasurer; provided, however, that nothing herein contained shall prevent

the state highway commission from recovering from the state highway trust fund moneys deposited or paid into such trust fund by counties and the federal government or other agencies, to defray the cost of engineering incident to the construction, supervision and inspection of projects carried on under the direction of the commission."

Montana's Assent to Federal ~~Aid Road Act~~, Section 1791, R.C.M. 1935:

"1791. Assent to federal aid road act. For and on behalf of the state of Montana, and in conformity with the requirement of section 1 of said act, the provisions of that certain act of congress approved July 11, 1916, known as the federal aid road act and entitled "An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," is hereby assented to. The state highway commission is hereby authorized to, for and on behalf of the state of Montana, enter into all contracts and agreements with the United States government or any officer, department or bureau thereof, relative to the construction or maintenance of highways in the state of Montana; and the state highway commission for and on behalf of the state of Montana is hereby authorized to do all other things necessary or required to carry out fully the co-operation contemplated by the said act of congress as hereby assented to, relative to the construction and maintenance of roads and highways in the state of Montana."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1003

AERO MAYFLOWER TRANSIT COMPANY,

Appellant,

vs.

**BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF MONTANA, ET AL.**

APPEAL FROM THE SUPREME COURT OF THE STATE OF MONTANA

**STATEMENT OPPOSING JURISDICTION AND
MOTION TO DISMISS OR AFFIRM**

R. V. BOTTOMLY,

Attorney General of Montana;

CLARENCE HANLEY,

Assistant Attorney General of Montana;

EDWIN S. BOOTH,

Special Assistant Attorney

General of Montana,

Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1003

AERO MAYFLOWER TRANSIT COMPANY,

A CORPORATION,

Defendant and Appellant,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF MONTANA, PAUL T. SMITH, LEONARD
C. YOUNG AND HORACE F. CASEY, AS MEMBERS OF
AND CONSTITUTING SAID BOARD OF RAILROAD COM-
MISSIONERS OF THE STATE OF MONTANA,

Plaintiff and Appellee

**STATEMENT BY APPELLEES OF GROUNDS IN OP-
POSITION TO APPELLATE JURISDICTION OF
ABOVE COURT, PURSUANT TO RULE 12, AND
MOTION TO DISMISS OR AFFIRM APPEAL.**

The appellees state the following matters and grounds against the jurisdiction of this court as asserted by the appellant herein, in its statement of the basis of appellate jurisdiction, filed herein on the 16th day of December, 1946, as required by Rule 12 of the Supreme Court.

For the reasons hereinafter stated, appellees herein, by their counsel, move this court to dismiss with costs the appeal taken herein to this court by Aero Mayflower Company, a corporation, upon the ground that the appeal does not present a substantial Federal question.

In the alternative, appellees move this court to affirm the judgment appealed from on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I

The Judgment Entered by the State District Court After Decision of the Montana Supreme Court

After the decision and order of the Supreme Court of Montana had become final by reason of the denial for rehearing on September 19th, 1946 (R. 157), the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, made and entered a judgment on the 28th day of October, 1946. This judgment purported to be in compliance with the decision and order of the Supreme Court, and provided that the appellant herein be restrained from operating its motor vehicles for hire on the public highways of Montana until it had paid the fees required to be paid by Sections 3847.16 and 3847.27, Revised Codes of Montana, 1935 (App. 13, 15) for the years of 1936, 1937, 1938 and 1939. Appellees herein believed that the decision of the Supreme Court of Montana entitled them to a judgment restraining appellant herein from operating in Montana until the fees due under each section of the statute for each year from 1936 until date of compliance are paid. A special proceeding was brought in the Supreme Court of Montana to compel the district court to enter a judgment in conformity with the decision and order of the Supreme Court of Montana. On December 19th,

1946, the Montana Supreme Court rendered its decision and order holding that appellees herein were entitled to a judgment restraining appellant from operating its vehicles on the public highways of the state of Montana until it makes report and pays the fees required by sections 3847.16 and 3847.27, R.C.M. 1935 (App. 13, 15) for each year from 1936 to the date of compliance. This decision became final on December 30th, 1946. The judgment will, when rendered, be added to the record or substituted for that dated October 28th, 1946 (R. 159, 160).

This supplementary and special proceeding was for the purpose of enforcing the final decision and order of the Supreme Court of Montana (R. 130 and following). It is not otherwise involved in this appeal. Explanation of the facts were, however, considered essential to explain the appearance of a judgment in the record dated subsequently to the date of filing the appeal. The opinion and judgment of the Supreme Court of Montana which became final on September 19th, 1946, was and is the final judgment. The lower state court had nothing further to do than carry out that judgment.

II

The Decision of the State Court That Sections 3847.16 and 3847.27, R.C.M. 1935, Apply to the Vehicles Operated in Montana by an Interstate Carrier Is a Decision on the Construction of State Statutes.

There is no dispute as to the facts in this case. The appellant is a motor carrier engaged in interstate commerce. Its business in Montana is transportation of property for hire, into, out of or through the State of Montana, in interstate commerce. The sole Federal question presented is whether, as to an interstate carrier, the provisions of Section 3847.16 and 3847.27, R.C.M., 1935 (App. 13, 15),

or either of them, violate the commerce clause, or the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

The opinion of the Supreme Court of Montana, decided that: (1) Section 3847.16 R.C.M. 1935 (App. 13), is applicable to interstate carriers (R. 135-142, Appellant's statement, App. A, Page 31-38), (2) section 3847.27 R.C.M. 1935 (App. 15) is applicable to interstate carriers (R. 142-144, appellant's statement App. A Page 38-40), the term "gross operating revenues of such carrier" used in section 3847.27 R.C.M. 1935 means "gross operating revenues derived from operations in Montana" and not "gross revenues from all sources" (R. 145, Appellant's statement App. A Page 40), and (4) section 3847.27, R.C.M. 1935 is not defective by reason of the failure to specify a method by which gross operating revenue in Montana may be determined for any year (R. 144-146, Appellant's statement App. A Page 39-41). Appellant assigns as error the decision of the Montana Court on each of these points.

The sections of the Montana statute involved are set forth in the appendix.

Appellant contends that section 3847.27 does not contain any rule whereby the gross operating revenue for any year in Montana may be determined, and that a federal question is therefore in issue. The record discloses that, for each year where figures are available as to the operation of appellant in Montana, the gross revenue is far below the figure necessary to equal the minimum fee prescribed (R. 18, 19, 20, 81, 82, 85, 86). On the basis of these facts the court was justified in its statement.

"Even if it be admitted that the manner of arriving at a sound basis upon which the tax or gross revenue is not provided by the statute, a contention to which we do not agree, no difficulty would arise in putting into effect the minimum fee of \$15.00 required for each

company vehicle operated within the state" (R. 146, Appellant's statement App. A Page 40).

This statement does not constitute a declaration that the gross revenue in Montana cannot be determined. Rather it is a factual statement that in this particular case no difficulty would arise in applying the minimum fee prescribed. The court then announced the rule that where a duty is placed on a Board but the statute fails to detail the mode of enforcement, any fair and reasonable mode of enforcement may be adopted by the Board (R. 146 Appellant's statement App. A Page 41).

Appellant contends that this statement is unfounded in law and exceeds the power of the Board in supplying necessary elements omitted by the Legislature. The statement of the Montana Court does not attempt to add anything to the statute. No element necessary to determine gross revenue is lacking.

The only possible point of uncertainty in the statute was as to whether the gross revenue intended in section 3847.27 R.C.M. was that on operations in Montana or total operations. The Montana Court has removed that uncertainty and decided that the gross revenue intended is only that on operations in Montana (R. 145, Appellant's statement App. A Page 40). The term "gross revenue" is certain, it means all revenue received without deduction. Given the routings of the shipments, a mileage guide, the weight and contents of the shipment, and the tariffs or contract, any auditor, company, court or board could determine the gross revenue from the operation in Montana. No other standard, method, formula or principle is necessary to determine "gross revenue from operations in Montana." In the event the gross revenue is not in sufficient amount so that the tax equals \$15.00 per vehicle per year, then the minimum prescribed would apply.

In so far as the points mentioned above are concerned, the only question involved is one of state statutory construction. No Federal question is involved and the decision of the Montana Supreme Court is final.

Hicklen v. Coney, 290 U. S. 169, 54 Sup. Ct. 142, 78 L. Ed. 247;

Great Northern Railroad Co. v. Sunburst Oil and Refinery Co., 287 U. S. 387, 53 Sup. Ct. 145, 77 L. Ed. 360;

Silas Mason Co. v. Tax Commission; 302 U. S. 186, 58 Sup. Ct. 233, 82 L. Ed. 187;

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188;

Huddleston et al. v. Dwyer, 322 U. S. 232, 64 Sup. Ct. 1015, 88 L. Ed. 1246.

III

No Substantial Federal Question Is Presented

Appellant contends that the application of the provisions of sections 3847.16 and 3847.27 R.C.M., 1935 to an interstate carrier is in violation of commerce clause (Art. 1, Sec. 8, Clause 3) and the equal protection and due process clause of the Fourteenth Amendment (14th Amend. Sec. 1) of the Constitution of the United States. Error is assigned because the Supreme Court of Montana did not so hold.

Federal questions are involved in these contentions and assignments of error. It is appellees' position, however, that each of the federal questions has been decided and determined by the Supreme Court of the United States and is so well settled as to no longer present a substantial federal question. The authorities believed to establish appellees' position on the various points are set forth below.

Section 3847.16 R.C.M. 1935, (App. 13) prescribes a fee of \$10.00 per vehicle per year for each vehicle operated on the public highways of Montana by a motor carrier. This fee is "in consideration of the use of the public highways of this state." Section 3847.27 R.C.M. 1935 (App. 16), prescribes a fee of $\frac{1}{2}$ of 1 percent of the gross revenue from operations in Montana (R. 145), subject to a minimum fee of \$15.00 per year per vehicle for each vehicle operated on the highways of Montana. This fee is "in consideration of the use of the highways of the state."

It is well settled that a state may impose upon vehicles used exclusively for interstate transportation a fair and reasonable tax for the privilege of using its highways for that purpose. Such a tax is not inconsistent with the commerce clause of the Constitution of the United States.

Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. Ed. 385;

Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. Ed. 222;

Clark v. Poor, 274 U. S. 556, 47 Sup. Ct. 702, 71 L. Ed. 1199;

Interstate Transit, Inc. v. Lindsey, 283 U. S. 183, 51 Sup. Ct. 380, 75 L. Ed. 953;

Aero Transit Co. v. Georgia Comm., 295 U. S. 285, 55 Sup. Ct. 709, 79 L. Ed. 1439;

Morf v. Bingaman, 298 U. S. 407, 56 Sup. Ct. 756, 80 L. Ed. 1245;

Dixie Ohio Express Co. v. State Revenue Commission, 306 U. S. 72, 59 Sup. Ct. 435, 83 L. Ed. 495;

Clark v. Paul Gray, Inc., 306 U. S. 583, 59 Sup. Ct. 744, 83 L. Ed. 1001.

It affirmatively appears that the fees prescribed by both sections, 3847.16 and 3847.27 R.C.M. 1935 (App. 13, 15) are

"in consideration of the use of the highways of this state." This is a legislative declaration of purpose which is sufficient to show that the fees are exacted as compensation for use. As pointed out by Appellant in his statement as to jurisdiction sections 3847.17 and 3847.28 R.C.M. 1935 originally allocated the fees received under 3847.16 and 3847.27 R.C.M., 1935 to administration of the Montana Motor Carrier Act. The fact that none of the fees may actually be devoted to highway maintenance or construction is immaterial and is no concern of appellant.

Clark v. Poor, 274 U. S. 554, 47 Sup. Ct. 702, 71 L. Ed. 1199;

Morf v. Bingaman, 298 U. S. 407, 56 Sup. Ct. 756, 80 L. Ed. 1245;

Dixie Ohio Express Company v. State Revenue Comm., 306 U. S. 72, 59 Sup. Ct. 435, 83 L. Ed. 495.

The fee prescribed in section 3847.16 R.C.M. 1935 (App. 13) is payable annually before the vehicle of the carrier may legally operate on the highways of Montana. It is a tax on the privilege of using the highways, without limitation as to mileage, and is not a forbidden burden on interstate commerce.

Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. Ed. 385;

Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. Ed. 222;

Aero Transit Co. v. Georgia Comm., 295 U. S. 285, 55 Sup. Ct. 709, 79 L. Ed. 1439;

Morf v. Bingaman, 298 U. S. 407, 56 Sup. Ct. 756, 80 L. Ed. 1245.

The fee prescribed by section 3847.27 R.C.M. 1935 (App. 15), is payable after the business has been done, and is

based directly on the gross revenue received from operations on Montana highways. Thus the fee is directly connected with the amount of revenue use made of the highways. The fact that a minimum fee is prescribed is not inconsistent with the stated purpose of the act to obtain compensation for the use of the highways. The nature of the fee shows clearly that it is related to the amount of use made of the highways by the carrier's vehicles.

The fees prescribed by section 3847.16 and 3847.27 apply in the same manner and to the same extent to intrastate, interstate or interstate and intrastate motor carriers for hire. They are only applicable to vehicles operated on Montana Highways, and on gross revenue derived from operations in Montana. Neither statute discriminates against the interstate carriers. Nothing in either section shows hostility to interstate commerce. Neither section violates the commerce clause or the 14th Amendment.

Travelers Ins. Co. v. Connecticut, 185 U. S. 364, 22 Sup. Ct. 673, 46 L. Ed. 949;

Hendrick v. Maryland, 235 U. S. 76, 35 Sup. Ct. 140, 59 L. Ed. 385;

Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. Ed. 222;

Clark v. Poor, 274 U. S. 556, 47 Sup. Ct. 702, 71 L. Ed. 1199;

Aero Transit Co. v. Georgia Comm., 295 U. S. 183, 55 Sup. Ct. 709, 79 L. Ed. 1439;

Western Livestock v. Bureau of Revenue, 303 U. S. 250, 58 Sup. Ct. 546, 82 L. Ed. 823;

Dixie Ohio Express Co. v. State Revenue Comm., 306 U. S. 72, 59 Sup. Ct. 435, 83 L. Ed. 495.

The tax is for a proper purpose and does not discriminate against the interstate carrier. The tax is not unreasonable

in amount so as to prohibit interstate commerce. The amount of the charges and the method of collection are primarily for determination of the state itself. The fees imposed by both sections, separately or considered together, are reasonable and are fixed according to a uniform, fair and practical standard. Neither fee constitutes a forbidden burden on interstate commerce.

Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. Ed. 222;

Clark v. Poor, 274 U. S. 556, 47 Sup. Ct. 702, 71 L. Ed. 1199;

Sprout v. South Bend, 277 U. S. 169, 48 Sup. Ct. 562, 72 L. Ed. 836;

Aero Transit Co. v. Georgia Comm., 295 U. S. 285, 55 Sup. Ct. 709, 79 L. Ed. 1439;

Morf v. Bingaman, 298 U. S. 407, 56 Sup. Ct. 756, 80 L. Ed. 1245;

South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 188, 58 Sup. Ct. 510, 82 L. Ed. 734;

Dixie Ohio Express Co. v. State Revenue Comm., 306 U. S. 72, 59 Sup. Ct. 435, 83 L. Ed. 495.

There is no showing in the record that either fee prescribed is unreasonable in amount. The burden of proof of unreasonableness would be on the appellant and no such showing has been made.

Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. Ed. 385;

Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. Ed. 222;

Morf v. Bingaman, 298 U. S. 407, 56 Sup. Ct. 756, 80 L. Ed. 1245;

South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 188, 58 Sup. Ct. 510, 82 L. Ed. 734;

Dixie Ohio Express Co. v. State Revenue Comm., 306 U. S. —, 59 Sup. Ct. 435, 83 L. Ed. 495;

Clark v. Paul Gray, Inc., 306 U. S. 583, 59 Sup. Ct. 744, 82 L. Ed. 1001.

The fact that appellant might not employ his vehicles on Montana highways to the extent permitted by the payment of the fee prescribed in section 3847.16 R.C.M. 1935 or by the payment of the minimum fee prescribed in section 3847.27 R.C.M. 1935 does now show that the fees are unreasonable or discriminatory.

Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. Ed. 222;

Aero Transit Co. v. Georgia Comm., 295 U. S. 285, 55 Sup. Ct. 709, 79 L. Ed. 1439;

Morf v. Bingaman, 298 U. S. 407, 56 Sup. Ct. 756, 80 L. Ed. 1245.

The numerous cases cited by appellant relating to occupation taxes, use taxes, or inspection taxes of railroads, express companies, pullman companies, telephone or telegraph companies or other utilities are not applicable to the questions here presented. In none of those cases is the fee involved compensation for use of a facility such as highways, owned constructed and maintained by the state as a place on which to conduct a business.

We respectfully submit that the decision of the Supreme Court of Montana as to matters of construction of state statutes is controlling, and that as to application of those statutes to interstate commerce, the decision of the Supreme Court of Montana is in harmony with the controlling deci-

sions of this court. The federal questions presented have been so firmly established and settled by decision of this court as to no longer be substantial federal questions. The motion to dismiss the appeal or, in the alternative, to affirm the decision appealed from should be granted.

Respectfully submitted,

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State of Montana;*

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APPENDIX

Statutes

Section. 3847.16 Revised Codes of Montana, 1935; (being also section 16, Chapter 184, Laws of the Twenty Second Legislative Assembly of the State of Montana 1931)

ANNUAL FEE FOR MOTOR CARRIERS—FEE FOR SEASONAL OPERATORS—COMPLIANCE REQUIRED OF MOTOR CARRIERS OPERATING IN MORE THAN ONE STATE—REVOCATION OF CERTIFICATE FOR FAILURE TO PAY FEES—LIEN OF FEES AND CHARGES.

“(a) In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of the public highways of this state, every motor carrier, as defined in this act, shall, at the time of the issuance of a certificate and annually thereafter, on or between the first day of July and the fifteenth day of July, of each calendar year, pay to the board of railroad commissioners of the state of Montana the sum of ten dollars (\$10.00), for every motor vehicle operated by the carrier over or upon the public highways of this state.

Provided, that a motor carrier engaged in seasonal operations only, where its said operations do not extend continuously over a period of not to exceed six (6) months in any calendar year, shall only be required to pay compensation and fees in a sum equal to one-half ($\frac{1}{2}$) of the compensation and fees herein provided and, provided further, that the compensation and fees herein imposed shall not apply to motor vehicles maintained and used by a motor carrier as standby or emergency equipment. The Board shall have the power and it is hereby made its duty to determine what motor vehicles shall be classed as standby or emergency equipment.

(b) When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the mak-

ing of annual or special reports or statements herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state.

(c) Upon the failure of any motor carrier to pay such compensation, when due, the board may in its discretion revoke the carrier's certificate or privilege and no carrier whose certificate or privilege is so revoked shall again be authorized to conduct such business until such compensation shall be paid.

(d) All compensation, fees, or charges, imposed and accruing under the provisions of this act, shall be a lien upon all property of the motor carrier used in its operations under this act; said lien shall attach at the time the compensation, fees, or charges become due and payable, and shall have the effect of an execution duly levied on such property of the motor carrier and shall so remain until said compensation, fees, or charges are paid or the property sold for the payment thereof."

Section 3847.23 Revised Codes of Montana, 1935; (being also section 16, Chapter 184, Laws of the Twenty Second Legislative Assembly of the State of Montana 1931)

"APPLICATION OF ACT TO INTERSTATE CARRIERS AND MOTOR CARRIERS OPERATING IN NATIONAL PARKS. The terms and provisions of this act shall apply to commerce with foreign nations, and to commerce among the several states of this Union, insofar as such application may be permitted under the provisions of the constitution of the United States, treaties made thereunder and the acts of Congress; provided that it shall not be necessary for an interstate or international motor carrier, in order to obtain a permit as herein provided, to make any showing of public convenience and necessity, except as to the transportation of passengers and/or freight between points within this state, the power to regulate such operation being specifically reserved herein;

and provided further, the board is hereby authorized to exercise any additional power that may from time to time be conferred upon the state by any act of Congress, and provided further, that any motor carrier operating in and about any national park, whose rates and methods of accounting are controlled by contract with the United States, shall not be subject to any regulation by the commission in conflict with such contract or in conflict with any regulation by the United States made pursuant to such contract or made pursuant to an act of Congress of the United States."

Section 3847.24 Revised Codes of Montana, 1935; (being also section 16, Chapter 184, Laws of the Twenty-Second Legislative Assembly of the State of Montana 1931)

"INVALIDITY OF PART OF ACT NOT TO AFFECT REMAINDER. If any section, subsection, sentence, clause, or phrase of this act is for any reason held unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislative assembly declares that it would have passed this act and each section, subsection, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional."

Section 3847.27 Revised Codes of Montana, 1935; (being also section 2, Chapter 108, Laws of the Twenty-Fourth Legislative Assembly of the State of Montana 1935)

"ADDITIONAL FEES CONCERNING MOTOR CARRIERS. In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall between the first and fifteenth days of January, April, July and October of each year, file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one per cent of the amount of such gross operating revenue; provided,

however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars (\$30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars (\$15.00)."

(9116)

In the
Supreme Court of the United States

OCTOBER TERM, 1947

No. 39

AERO MAYFLOWER TRANSIT COMPANY, a
Corporation,

Defendant and Appellant,

vs.

BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF MONTANA, HORACE F. CASEY,
LEONARD C. YOUNG, and PAUL T. SMITH, as
Members of and Constituting said Board of Railroad
Commissioners of the State of Montana,

Plaintiffs and Appellees.

BRIEF OF APPELLEES

APPEAL FROM THE SUPREME COURT OF THE
STATE OF MONTANA

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**In the
Supreme Court of the United States**

OCTOBER TERM, 1947

No. 39

AERO MAYFLOWER TRANSIT COMPANY, a
Corporation,

Defendant and Appellant,

vs.

**BOARD OF RAILROAD COMMISSIONERS OF THE
STATE OF MONTANA, HORACE F. CASEY,
LEONARD C. YOUNG, and PAUL T. SMITH, as**
Members of and Constituting said Board of Railroad
Commissioners of the State of Montana,

Plaintiffs and Appellees.

BRIEF OF APPELLEES

I.

THE OPINION OF THE COURT BELOW

The decision of the Supreme Court of the State of Montana, dated June 29, 1946, was rendered on an appeal from the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow. This decision became final on September 19, 1946, upon the denial of the petition for rehearing. The decision has not appeared in the official reports but is reported in 172 Pac. (2d) 452 and is found on page 103 of the Record.

II.

STATEMENT OF THE CASE

Counsel has made a detailed and exhaustive statement of the case in appellant's brief. We desire to submit this simplified statement of the case which sets forth the facts and issues presented in this appeal.

The Motor Carrier Act of Montana, pertinent parts of which are set forth in this brief and the Appendix, applies to the transportation of property by motor vehicle for hire, over or upon the highways of Montana. Section 3847.23, Revised Codes of Montana, 1935, (App. 53) provides this Act is applicable to commerce among the several states of this Union, insofar as the application may be permitted under the provisions of the Constitution of the United States and Acts of Congress. Section 3847.16, Revised Codes of Montana, 1935, (App. 50) provides that every motor carrier shall pay flat fee of ten dollars (\$10.00) for every vehicle operated by the carrier over or upon the highways of Montana, in the manner specified in the statute. Section 3847.27, Revised Codes of Montana, 1935, (App. 54) provides for the payment of a fee of one-half of one per cent on the amount of gross operating revenue payable quarterly and subject to the minimums specified in the section.

In 1935 Aero obtained from the Board of Railroad Commissioners of the State of Montana, Permit No. 1354. This permit authorized interstate service by the appellant over and on the public highways of Montana. (R. 11) Commencing with the year 1936, the appellant refused to pay the fees provided by Section 3847.16, Revised

Codes of Montana, 1935, and 3847.27, Revised Codes of Montana, 1935. On September 19, 1939, the Board of Railroad Commissioners issued an Order to Show Cause to the appellant herein, as to why the permits granted by the appellee Board should not be cancelled for non-compliance with the rules and laws of the State of Montana. (R. 35.) Return to this Order to Show Cause was made (R. 36) on October 9, 1939. After considering the Order to Show Cause and the return of the appellant to such order, the Board issued its order cancelling and terminating the authority granted by the Board of Railroad Commissioners of the State of Montana to the Aero May-Flower Transit Company for failure to pay fees and to comply with the rules and regulations of the Board. (R. 45.)

On October 13, 1939, the Board of Railroad Commissioners of the State of Montana filed suit in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, wherein it sought an injunction to prevent the operation of appellant herein, over or upon the highways of the State of Montana, in violation of the State Act. (R. 1-4.) Issue was joined on this case and hearing was held before the Court. The District Court of the Second Judicial District of the State of Montana made its findings of fact and conclusions of law, wherein it found that Section 3847.16, Revised Codes of Montana, 1935, was a valid exercise of legislative authority and that the appellant should be enjoined until it paid the fees specified to be due under that section. The Court found that Section 3847.27, Revised

Codes of Montana, 1935, was invalid for the reason that it failed to specify any method by which the gross revenue of the defendant may be determined, and for the further reason the Public Service Commission of the State of Montana has nothing to do with the regulations and supervision of the motor carriers. (R. 95-97.) Amended final judgment was issued in conformity with such act. (R. 97-98.)

An appeal was filed with the Supreme Court of Montana by each of the parties, as to that part of the judgment which was against them. (R. 99-100.) The Supreme Court of Montana filed its opinion, (R. 103-123) wherein by a four to one decision, it found that Section 3847.16 was applicable to the vehicles operated by the appellant on the highways of Montana and that Section 3847.27 was applicable to the gross revenue derived from operations over or upon Montana highways, subject to the minimum fees specified in said section, and found that appellant should be enjoined until it complied with the provisions of the Motor Carrier Act of Montana and particularly with the sections providing for fees specified above.

This appeal is taken from the decision of the Supreme Court of Montana on the grounds specified in the Specifications of Error.

5
III.

ARGUMENT

Introduction.

It will be the purpose of this introduction to explain certain matters appearing in the record and the statutes of the State of Montana, but which are not involved in the issue presented. We may thus avoid any misunderstanding by reason of the appearance of these matters in the record briefs.

The record contains a judgment on remittitur filed October 28, 1946 (R. 140) and a second judgment on remittitur dated January 3, 1947 (R. 154). The first judgment (R. 140) purported to be in compliance with the judgment and order of the Supreme Court of Montana which became final on September 19, 1946, and from which this appeal is taken. This judgment provided that the appellant herein be restrained from operating its vehicles for hire on the public highways of Montana until it paid the fee required to be paid by the two statutes here involved for the years 1936, 1937, 1938 and 1939. Appellees herein believed that the decision of the Supreme Court of Montana entitled them to a judgment restraining appellant herein from operating in Montana until the fees under both statutes for each year, from 1936 to the date of compliance, were paid. A special proceeding was brought in the Supreme Court of Montana to compel the District Court to enter a judgment in conformity with the decision and order of the Supreme Court of Montana rendered in this case. (R. 123). On December 19, 1946, the Montana Su-

preme Court rendered its decision and order holding that appellees were entitled to a judgment restraining appellant herein from operating its vehicles for hire on the public highways of Montana until it makes report and pays the fees required by Sections 3847.16 and 3847.27, Revised codes of Montana, 1935, (App. 50, 54) for each year from 1936 to the date of compliance. The decision of the Montana Supreme Court in the supplemental proceeding has not been officially reported, but is reported as State ex rel. Board of Railroad Commisisoners et al. v. District Court of the Second Judicial District of Montana, in and for Silver Bow County, et al., 175 Pac. (2d) 173.

After this decision became final the lower state court rendered its second judgment on remittitur. (R. 154)

Each of the judgments on remittitur was issued for the purpose of carrying out the judgment of the Montana Supreme Court, involved in this appeal (R. 103 and following). The lower court had nothing further to do than carry the judgment into effect. Neither of the judgments present any issue on fact. We need not consider them further.

Section 3847.27, Revised Codes of Montana, 1935, involved in this action was amended by Section 2, Chapter 73, Laws of Montana, 1947. The amended sections are set forth in full on pages 55-57 of the Appendix. This amendment was made after the appeal in the instant case was perfected and can have no possible effect on issues now before this Court. While incidental reference will be made to this amendment, we recognize that this case must be decided on the statutes as they existed throughout the

pendency of this action. We believe, however, that the Court should be advised of the amendment and have therefore set it forth in the Appendix. It will be seen that the effect of this amendment is to clarify the statutes to conform to the administrative practice of the appellee Board and to the interpretation placed on the original section of the statutes by the Supreme Court of Montana in this case.

SUMMARY

Point. A. The decision of the Supreme Court of Montana, holding that persons engaged in the transportation of property for hire in interstate commerce and using the highways of the State of Montana are required to comply with and pay the fees prescribed by Sections 3847.16 and 3847.27, Revised Codes of Montana, 1935, is a correct interpretation of the Motor Carrier Act of Montana. Section 3847.16, Revised Codes of Montana, 1935, provides for a flat fee per vehicle operated on the highways of Montana by motor carrier, as defined in the act. This fee is payable annually before the vehicle operates on the highways of the state for hire. It is not conditioned on the amount of use to be made of the highways. The Motor Carrier Act provides that it is applicable to carriers engaged in interstate and foreign commerce insofar as such application is permitted by the Constitution of the United States and Acts of Congress. Section 3847.27, Revised Codes of Montana, 1935, prescribes a "gross revenue fee of $\frac{1}{2}$ of 1 percent of the gross operating revenue." This fee is payable quarterly after the fee is earned. It is subject to an annual minimum, provided the fee on the percentage

of gross revenue does not equal a certain minimum. This minimum is computed on the number of vehicles operated under the Motor Carrier Act. The lower court interpreted the phrase "gross operating revenue" to mean "gross revenue from operations in Montana." This interpretation is the only possible interpretation which can be placed on the phrase, under the provisions of the Motor Carrier Act, the various decisions, and the controlling rules of statutory construction. The fees prescribed by each of the sections are conditioned "in consideration of the use of the highways of the state." No method or formula is necessary to determine gross operating revenue in Montana. The Montana Supreme Court has correctly interpreted the Motor Carrier Act of Montana as being applicable to this appellant.

Point B. The meaning and interpretation of the Motor Carrier Act is a matter of statutory construction of state law. It is the duty and province of the Montana Supreme Court to determine the construction to be placed on state laws. The decision of the State Court becomes a part of the act to the same extent as though the act were written as interpreted. The decision of the Montana Court as to the Montana Motor Carrier Act is binding on this Court. The question remaining for this Court is whether, as enacted by the Legislature of Montana and interpreted by the Supreme Court of Montana, the fees prescribed by Sections 3847.16 and 3847.27, Revised Codes of Montana, 1935, are in violation of the provisions of the Constitution of the United States.

Point C. The right of the state to levy fair and reason-

able taxes as compensation for the privilege of using its highways by interstate carrier is firmly established and such taxes are not forbidden burdens on interstate commerce. The fees assessed against motor carriers for operations on Montana highways are declared by the legislature to be compensation for the use of the highways. The flat fee is collected before operation and the gross revenue fee, subject to the minimum fee, is definitely related to the beneficial use made of the highways. The method of collection shows the fees are collected for the use of the highways. The fact that the money is not actually used for highway purposes is immaterial, so long as the purpose of the assessment is proper. There is no federal statutory prohibition to such taxes so long as the taxes do not constitute a forbidden burden and are not discriminatory. They may be applied to solely interstate carriers under the rules announced by this Court. The fees prescribed by the Montana statutes considered either separately or collectively are nominal and not unreasonable. They are not hostile to interstate commerce. The burden was on appellant to show that the fees are unreasonable, but no such showing has been made. The fact that appellant does not make the use of the highways permitted by the payment of the fees does not show that such fees are unreasonable. The fees assessed are properly chargeable against interstate carriers on interstate transportation and no apportionment of interstate and intrastate revenue is required as in taxes which may affect local and interstate business where compensation for a facility furnished is not involved. An interstate carrier is properly enjoined

from operating on Montana highways until it complies with reasonable and proper laws applicable to its operations.

Point D. The fees prescribed by the Montana Motor Carrier Act are applicable to all carriers operating on the public highways of Montana and are fixed according to a uniform, fair and practical standard. As to an interstate carrier, the fees are applicable only to operations conducted in Montana. The act is not discriminatory against interstate commerce. There is no possibility of any other state taxing the appellant for the same privilege. The collection of the fees prescribed as applied to appellant are not in violation of the equal protection or due process clause of the Constitution of the United States.

Point A.

The Motor Carrier Act of Montana, and Particularly the Provision Providing for Fees, Applies to Interstate Carriers of Persons and Property for Hire on the Highways of Montana.

Many of the errors specified by appellant (R. 146-149) relate entirely to the interpretation of the state statutes. Before discussing the federal questions involved we will discuss the interpretation of these statutes as made by the Supreme Court of Montana and as raised by these specifications of error.

The Montana Motor Carrier Act Generally

The Motor Carrier Act was enacted in 1931. Sections 3847.27 and 3847.28, Revised Codes of Montana, 1935, were added to the act by Chapter 100, Laws of 1935. With the exception of minor amendments, not involved

here, the act has not been changed since its enactment.

Section 3847.1, Revised Codes of Montana, 1935, reads in part:

"Unless the language on contest clearly indicates that different meanings are intended, the following words, terms and phrases shall for the purpose of this act, be given the meanings hereinafter subjoined to them.

"(a) The word 'board' means the board of railroad commissioners of the State of Montana.

* * *

"(h) The term 'motor carrier', when used in this act means every person or corporation, their lessees, trustees, or receivers appointed by any court whatsoever, operating motor vehicles upon any public highways in the State of Montana, for the transportation of persons and/or property for hire, on a commercial basis either as a common carrier or under private contract, agreement, charter or undertaking.

* * *

"(j) The word 'compensation' as used in this act shall mean the charge imposed upon motor carriers in consideration of the use of the highways in this state by such motor carriers, as provided in section 3847.16."

* * *

Section 3847.2, Revised Codes of Montana, 1935, reads in part:

* * *

"(b) It shall be unlawful for any corporation or person, its or their officers, agents, employees or servants, to operate any motor vehicle for the transportation of persons and/or property for hire on any public highway in this State except in accordance with the provisions of this act."

Section 3847.16, Revised Codes of Montana, 1935,

(App. 50) provides for the payment of a fee of \$10.00 per annum per vehicle, payable in advance on vehicles operated by "motor carriers as defined in this act" on the public highways of Montana. Section 3847.27, Revised Codes of Montana, 1935, (App. 54) provides for a gross operating revenue payable by every "motor carrier holding a certificate of public convenience and necessity." This latter fee is payable quarterly on the revenue of the preceding quarter and is subject to an annual minimum of \$15.00 per vehicle for each vehicle registered and/or operated by a Class "C" carrier and \$30.00 per vehicle for each vehicle registered and/or operated by Class "A" and "B" carriers. Each of these fees are in addition to all other licenses, fees and taxes imposed upon motor carriers, and are in consideration of the use of the highways of this state. There is not one word which would indicate an intention to exempt any interstate carrier using the highways of Montana from the provisions of the act. On the contrary, Section 3847.23, Revised Codes of Montana, 1935 (App. 53) provides that the act applies to interstate commerce, insofar as such application may be permitted under the provision of the Constitution of the United States and Acts of Congress.

Whether the Constitution of the United States or Laws of Congress prohibit the enforcement of the provisions of the Motor Carrier Act will be discussed later in this brief. From the clear and unmistakeable language of the act there can be no question but that the legislature intended the act to apply to all transportation of property for hire over or upon the public highways of Montana. There is

nothing in the act to indicate any different treatment of the classes of motor carriers whether they operate intra-state, interstate or interstate and intrastate. As the Montana Court said:

"The Act was obviously intended to apply to motor carriers operating over the highways of the State."
(R: 113.)

There can be no question but that appellant is a "motor carrier," as defined in the Montana Act, when it operates its vehicles for hire upon the public highways of the state. The appellant complied with the Motor Carrier Act and obtained a permit from the appellee Board, authorizing it to transport property in interstate commerce for hire over and on the public highways of Montana (Def. Answer R. 11). On October 9, 1939, the Board cancelled the permit of appellant for failure to pay the fees provided by the Motor Carrier Act (Def. Answer, R. 12, 45, 46). In fact this appellant recognized the Motor Carrier Act of Montana by applying for a permit, as in the act provided, but refused to pay the fee prescribed.

Section 3847.16 Is Applicable to Appellant.

Section 3847.16, Revised Codes of Montana, 1935, (App. 50) provides that "every motor carrier as defined in this act," *appellant herein*, shall, annually pay the appellee Board the sum of ten dollars (\$10.00) for every motor vehicle operated by the carrier over or upon the public highways of Montana. That this section was intended to apply to interstate carriers is definitely shown by sub-paragraph (b) which provides that when transportation service is rendered partly in this state and partly

in an adjoining state or foreign country, motor carriers shall comply with the provisions of the act relating to the payment of compensation (the fee prescribed in this section), in the same manner as motor carriers operating wholly within Montana.

The Application of Section 3847.27.

Section 3847.27 (App. 54) was enacted as Section 2, Chapter 100, of the Laws of 1935. It will be noted that this section refers to the Public Service Commission. The State District Court held that this section was invalid for the reason that the Public Service Commission mentioned in the section has nothing to do with the regulation and supervision of motor carriers using the public highways of the State of Montana. (R. 96.) There can be no question but that the "Board of Railroad Commissioners" should have been used in Section 3847.27.

The Board of Railroad Commissioners was created in 1907. (Section 3779, Revised Codes of Montana, 1935.) The Public Service Commission was created in 1913. (Section 3879, Revised Codes of Montana, 1935.) Section 3880, Revised Codes of Montana, 1935, reads in part as follows:

" . . . The board of railroad commissioners of the state of Montana shall be ex-officio the public service commission hereby created, and for the purposes of this act shall be known and styled 'Public Service Commission of Montana.' . . . "

Both Boards are the same. After reviewing the statute and the duties of the two Boards the Montana Supreme Court said:

"The terms 'Board of Railroad Commissioners' and 'Public Service Commission' are used interchangeably and we think it was the legislative intent by section 3847.27 to use the words 'Public Service Commission' as including the 'Board of Railroad Commissioners.' If this were not so, then Section 3847.27 would have no meaning whatsoever, since strictly speaking the Public Service Commission does not issue certificates of public convenience and necessity." (R. 116.)

One of the reasons for the recent amendment to Section 3847.27, Revised Codes of Montana, 1935 (App. 54) was to correct this error by substituting the words "Board of Railroad Commissioners" where necessary. The amendment has no bearing on this case.

Section 3847.27, Revised Codes of Montana, 1935, (App. 54) provides that every motor carrier holding a certificate of public convenience and necessity shall quarterly file a statement showing "gross operating revenue for the preceding three months of operation," and shall pay a fee of one-half of one percent of the amount of such gross operating revenue, subject to a minimum annual fee for each vehicle registered and/or operated under the Motor Carrier Act. As has been pointed out above, the appellant is a "motor carrier" within the meaning of the act. It transported property for hire over and upon the highways of Montana in interstate commerce. (R. 8, 13-15, 61, 62.) The vehicles used in Montana were required to be registered with the Board under Section 3847.16, Revised Codes of Montana, 1935, and were operated under the Motor Carrier Act. Prior to the cancellation of its permit for non-payment of fees, appellant held author-

ity to operate its vehicles on the highways of Montana from appellee Board: (R. 11, 12, 59.) There is no indication that it was intended to exempt interstate carriers from the fee prescribed by this section. To the contrary, a reading of the Motor Carrier Act in its entirety and particularly Section 3847.23, Revised Codes of Montana, 1935, (App. 53) shows a very specific intent to include interstate carriers within the provision of 3847.27. The Montana Court was correct in so holding (R. 113, 114.).

The Definition of "Gross Operating Revenue."

Appellant specifies as error the holding of the Montana Court, that "gross operating revenue" as used in Section 3847.27, Revised Codes of Montana, 1935, (App. 54) means "gross revenue derived from operations in Montana." It also specifies error of the Court in *gratuitously* assuming that appellant derives gross revenue "from operations in Montana" to which the tax could be applied. (Spec. of Error B IV, VI, VIII; R. 148, 150.) Appellant would have the words "gross operating revenue" mean all revenue of the appellant wherever earned. Such a holding by the courts would, in fact, be a gratuity for it would give away the fees intended to be collected by making them unconstitutional. A most cursory examination of the statutes shows that such a contention is not only unsound and untenable, it is ridiculous and absurd.

The Motor Carrier Act relates to the carriage of persons and/or property for hire on the public highways of Montana. Section 3847.16 (b), Revised Codes of Montana, 1935, (App. 50) provides that carriers who engage in

interstate or foreign commerce shall file reports showing the "total business performed within the limits of this State." Section 3847.23, Revised Codes of Montana, 1935, (App. 53) provides that the provisions of the act are applicable to interstate carriers insofar as permitted by the Constitution of the United States and the Acts of Congress. These provisions of law were in existence when Section 3847.27, Revised Codes of Montana, 1935, was enacted. This section states that the fees are "in consideration of the use of the highways of this state" and the minimum fees are based on the vehicles using the highways of Montana under the Motor Carrier Act.

The legislature knew that only business performed in this state was to be reported to the Board. It likewise knew that it could only tax interstate vehicles for the use of the highways for it provided that the fee was in consideration of the use of the highways. It is elementary that a state has no powers beyond its boundaries. The legislature clearly did not intend to usurp a power to require reports or levy a fee on business done in other states, or to attempt to say that a fee on business done between New York and New Jersey would be in consideration of the use of Montana highways by vehicles which never crossed Montana boundaries. To impute such an intention to the legislature or to place such a construction on the statute is out of keeping with all the rules of statutory construction and common sense.

The Board has never demanded the payment of fees based on the entire revenue of the appellant (R. 63, 64, 67, 69.). The administrative interpretation has been that "gross operating revenue" meant gross operating revenue

in Montana. The term operating revenue means revenue from operation and not gross receipts on some other basis. In its opinion, the Montana Court correctly set forth the rules of construction when it said:

"On the question of the constitutionality of section 3847.27, this court said in the case of *State v. Stark*, 100 Mont. 365, 52 Pac. (2d) 890, that, 'In determining whether an Act of the legislative assembly is invalid or not, it has long been the established rule of this court that the constitutionality of any Act shall be upheld if it is possible to do so (*State ex rel. Tipton v. Erickson*, 93 Mont. 466, 19 Pac. (2d) 227; *Halve v. County Treasurer*, 82 Mont. 98, 105, 265 Pac. 60,) and that a statute "is prima facie presumed" to be constitutional, and all doubts will be resolved in favor of its validity. (*State ex rel. Toomey v. Board of Examiners*, 74 Mont. 1, 238 Pac. 316, 320.) The invalidity of a statute must be shown beyond a reasonable doubt before this court will declare it to be unconstitutional. (*Herrin v. Erickson*, 90 Mont. 259, 2 Pac. (2d) 296.) And a statute will not be held unconstitutional unless its violation of the fundamental law is clear and palpable. (*Hill v. Rae*, 52 Mont. 378, 158 Pac. 826, Ann. Cas. 1917E, 210, L. R. A. 1917A, 495.)"

"By reading sections 3847.27 and 3847.16 together, which the rule on statutory construction enjoins, *State v. Bowker*, 63 Mont. 1, 205 Pac. 961, it becomes clear that the clause in section 3847.27 imposing upon the company a tax of one-half of one percent based upon its 'gross operating revenue' that in the use of this phrase by the legislature the gross revenue derived from operations in Montana was intended and not the company's gross revenue from all sources. No other reasonable intention is conveyed by paragraph (b) of section 3847.16." (App. 50)

The decision of the Montana Court is in harmony with

the decision of this Court. In *Haggar Co. v. Helvering*, 308 U. S. 389, 60 Sup. Ct. 337, 84 L. Ed. 340, a taxation case, this Court said:

"All statutes must be construed in the light of their purpose. A literal reading of them which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose, citing authorities."

Ohio Tax Cases, 232 U. S. 576, 591, 34 Sup. Ct. 372, 58 L. Ed. 737.

Sorrells v. United States, 87 U. S. 435, 446, 53 Sup. Ct. 210, 77 L. Ed. 413.

Hicklin v. Coney, 290 U. S. 169, 54 Sup. Ct. 142, 78 L. Ed. 247.

United States v. Freeman, 15 U. S. 548, 11 L. Ed. 724.

It is true that all of appellant's business is in interstate commerce and its revenues derived from that business. But this does not mean that no revenue is derived from operations on Montana highways. The evidence of appellant shows that revenues are derived from operations in Montana (R. 62). The answer likewise alleges that the transportation is performed under contract in accordance with the rates on file with the Interstate Commerce Commission (R. 8). These facts demonstrate positively that appellant derives revenue from its operations over or upon Montana highways when it transports property on those highways. The term operating revenue is self-explanatory—it means revenue received from operations. It is not to be confused with gross receipts.

Is a Method of Determining Gross Revenue in
Montana Lacking?

Five of the specifications of error set forth by appellant relate to the alleged error of the court in sustaining section 3847.27, Revised Codes of Montana, 1935, (App. 54) even though no method of apportionment or determination of the tax is set forth in Section 3847.27, Revised Codes of Montana, 1935. (Spec. of Error B III, V, VII, IV, X, R. 148-150.) The contention is that no method is set forth in the law to determine the gross revenue derived from operations or to apportion the interstate revenue in Montana and that outside of Montana. It is further contended that the Montana Court erred in holding that the minimum fee could be put into effect even if it be admitted that the manner of arriving at a sound basis upon which the gross revenue is determined is not provided.

The pleadings and evidence show that the revenues derived from appellant's operations in Montana would not have been sufficient to equal the minimum annual fee prescribed in the statute of \$15.00 per vehicle for each vehicle operated in Montana (R. 13, 14, 15, 61, 62, 65). The answer of Mr. Matson, Secretary to the Board, as to the demand made on appellant summarized the situation when he said:

"It is my understanding that the Board has accepted the defendant's figures in that respect, and since the $\frac{1}{2}$ of 1% of the gross revenue of the operations in the State of Montana was less than the minimum, they demanded the minimum fee of \$15.00 per vehicle." (R. 67.)

The determination of the correct gross revenue fee was

not involved in this case, and on the evidence could not have been, no matter how computed. Appellant's gross revenue in Montana was far short of the \$3,000.00 per vehicle necessary to equal the minimum of \$15.00 computed on the basis of one-half of one percent gross revenue. It was for this reason that the Montana Court said:

"Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue (can be determined) is not provided by the statute, *a contention to which we do not agree*, no difficulty would arise in putting into effect the minimum fee of \$15.00 required for each company vehicle operated within the state." (R. 115; apparent omission supplied; emphasis ours.)

Determination of the computation of gross revenue would not affect the appellant and it cannot be heard to complain that the court did not decide the exact formula or method to be used. No method of determining gross operating revenue of appellant has been required or prescribed. The question as to whether a given method would be illegal is speculative and academic and of no avail to appellant.

Stephenson v. Binford, 287 U. S. 251, 277, 53 Sup. Ct. 181, 77 L. Ed. 288.

Hicklin v. Coney, *supra*.

On the facts, appellant would not be liable for more than the minimum fee, and it cannot set up a claim because of the uncertainty of method to compute such fees.

Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. Ed. 385.

The term "gross operating revenue" has been defined as gross operating revenue derived from operations in Montana. (R. 115.) As so defined the statute is clear and no method of determination is necessary or required in order to determine gross operating revenue in Montana. The term means all revenue received from operations in Montana. It is not to be confused with "gross receipts" or "gross business." Gross operating revenue in Montana cannot include any revenue earned in other states whereas "gross receipts" or "gross business" undoubtedly would vary from the operating revenue in Montana and might levy a tax on money actually earned outside Montana. Gross operating revenue in Montana would not be susceptible of tax by any other state.

Appellant's Specification of Error B IX, (R. 150) alleges error because the Montana Court found no method provided in the statute for ascertaining such alleged Montana revenues, i.e., "By road mileage traveled in the state, number of vehicles, road hours, cargo, volume of traffic, ton miles, vehicle miles or any other factor or combination of factors" and that the tax "could not be ascertained except by guess work."

As a matter of fact nothing so nearly represents the benefit to the carrier from use of Montana highways as "gross operating revenue." It represents wholly beneficial use and does not take into account empty mileage for the convenience of the carrier or necessary "deadhead" mileage. Likewise nothing is so susceptible to accurate mathematical determination as "gross operating revenue in Montana." All contracts for transportation, and all tariffs are

susceptible to reduction to a rate per 100 pounds or per ton per mile. Given the contract, or tariffs and the classification of the shipments, the routing of the shipment—all matters of business record with the carrier—and mileage guides or maps, any company, auditor, board or court could determine the amount of operating revenue derived from operation in Montana. "Gross operating revenue" does not involve vehicle hours, vehicle miles, empty or deadhead mileage, number of vehicles, volume of traffic or any other possible non-beneficial item.

The appellant testified that in determining what the fee for various years under Section 3847.27, Revised Codes of Montana, 1935, would have amounted to, arrived:

"at the income for that operation of the load miles operated in Montana by using an average income per mile figure based upon the probable load factor we would have had in Montana." (R. 61.)

We thus see that appellant used the same principles mentioned above in arriving at the amount of the fees payable under the act. Average figures and probable load factors would not be as accurate as actual figures on individual shipments but the principle is the same. It shows that the appellant was able to compute the tax under the statute.

No amount of definition or explanation could make the term "gross operating revenue in Montana" any clearer or plainer. No method, formula or device for determining the method of computing the tax is necessary or required, and any such attempt is and would be superfluous. The

1947 legislature amended Section 3847.27 to explain the term gross revenue in Montana. The amendment appears at page 54 of the Appendix. This amendment is not involved in this action but is set forth for the information of the Court. An analysis of the amendment shows, however, that it actually adds nothing to the plain and simple term "gross operating revenue in Montana." The amendment in more words clarifies the provision but actually neither adds nor detracts anything from the original section as interpreted by the Montana Court.

Appellees deny that the amendatory legislation confesses the validity of Aero's objections to the text of the statute. (Section 3847.27, Revised Codes of Montana, 1935, as amended by Section 2 of Chapter 73, Laws of Montana, 1947) as contended by appellant in its brief.

The amendment is merely declaratory of the intention of the legislature, and was enacted subsequent to the decision of the Supreme Court of Montana in the instant case interpreting this specific statute. It is but a legislative expression confirming the judicial interpretation as that intended by the legislature in enacting the original statute.

The rule is well established by decisions of this Court that curative or declaratory statutes are to be given great weight in the interpretation and construction of statutes. The earliest expression of this Court is that in the case of *United States v. Freeman*, 3 How. 556, 11 L. Ed. 724, where the Court said:

"A legislative act is to be interpreted according to the intention of the Legislature, apparent upon its

face. . . . In doubtful cases a Court should compare all parts of a statute and different statutes in *pari materia* to ascertain the intent of the Legislature. . . . If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; *and if it can be gathered from a subsequent statute in pari materia what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of its meaning, and will govern the construction of the first statute.*" (Emphasis ours.)

Such construction will relate back to the earlier statute. As was said in the case of *Cope v. Cope*, 137 U. S. 682, 688, 34 L. Ed. 834, 11 Sup. Ct. 224:

"These several acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones."

In the case of *Tiger v. Western Investment Company*, 221 U. S. 286, 309, 55 L. Ed. 747, 31 Sup. Ct. 584, this Court said:

"When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. *Cope v. Cope*, 137 U. S. 682, *United States v. Freeman*, 3 How. 556."

In the case of *Johnson v. Southern Pacific Company*, 196 U. S. 1, 21, 49 L. Ed. 394, 25 Sup. Ct. 175, this Court said:

"As we have no doubt of the meaning of the prior law, the subsequent legislation can not be regarded

as intended to operate to destroy it. *Indeed, the latter act is affirmative, and declaratory, and, in effect, only construed and applied the former act.* *Baily v. Clark*, 21 Wall 284; *United States v. Freeman*, 3 How. 556; *Cope v. Cope*, 137 U. S. 682; *Witmore v. Markoe*, post 68. *This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived.*" (Emphasis ours.)

It is submitted that the amendatory legislation is but affirmative and declaratory of the legislative intent and but construes and applies the former act. It in no sense "confesses the validity" of appellant's objections to the act before amendment.

The Montana Supreme Court has held that the Motor Carrier Act and particularly Sections 3847.16 and 3847.27 is applicable to appellant on its interstate operations upon or over the public highways of Montana. It has held that the term "gross operating revenue" in Section 3847.27 means gross revenue derived from operations in Montana. The Motor Carrier Act must be read as though it were written to include such interpretation.

Point B.

The Interpretation of the Montana Statutes by the Supreme Court of Montana Is Binding on This Court.

The interpretation of the statutes of Montana by the Montana Supreme Court is a matter of statutory construction. The decision of the state court is final. This Court, in *Moorehead v. People of State of New York, ex rel. Tipaldo*, 298 U. S. 587, 56 Sup. Ct. 918, 80 L. Ed. 1347, said:

"This court is without power to put a different construction upon the state enactment from that adopted by the highest court of the state. We are not at liberty to consider petitioners arguments, based on the construction repudiated by that court. The meaning of the statute as fixed by its decisions must be accepted here as if the meaning had been specifically expressed in the enactment. *Supreme Lodge, Knights of Pythias v. Meyer*, 265 U. S. 30, 32, 44 S. Ct. 432, 68 L. Ed. 885. Exclusive authority to enact carries with it final authority to say what the measure means. *Jones v. Prairie Oil & Gas Co.*, 273 U. S. 195, 200, 47 S. Ct. 338, 71 L. Ed. 602. . . . As our construction of an act of Congress must be deemed to be the law of the United States, so this New York Act as construed by her court of last resort, must here be taken to express the intention and purposes of her law makers. *Green v. Neal's Lessee*, 6 Pet. 291, 295-298."

State of Minnesota ex rel. Pearson v. Probate Court, 309 U. S. 270, 273, 60 Sup. Ct. 523, 84 L. Ed. 744, 126 A. L. R. 530.

This Court said in *Hicklin v. Coney*, *supra*:

"Appellant complains of this construction of the statute as being contrary to its terms, but the question is not for us. The decision of the state court is controlling as to the meaning and extent of the statutory requirements." (Citing authorities.)

Questions of construction of state statutes are questions for decisions by state courts, and the interpretations made by the state court of last resort are binding on this Court.

Great Northern Railroad Co. v. Sunburst Oil and Refining Co., 287 U. S. 387, 53 Sup. Ct. 145, 77 L. Ed. 360.

Silas Mason Co. v. Tax Commission, 302 U. S. 186, 58 Sup. Ct. 233, 82 L. Ed. 187.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188.

Huddleston, et al. v. Dyer, 322 U. S. 232, 64 Sup. Ct. 1015, 80 L. Ed. 1246.

State of Louisiana v. Resweber, 329 U. S. 459, 67 Sup. Ct. 374, 91 L. Ed. 359.

The meaning of the Montana statute and the intent of the Montana Legislature have been determined by the Montana Court. All specifications of error raised by appellant, based on error of interpretation of the statute should be disregarded. This Court is not at liberty to interpret the Montana statutes, even though, if it were proper for it to do so, it might have arrived at a different conclusion.

Great Northern Railroad Co. v. Sunburst Oil and Refining Co., supra.

In determining whether or not the Montana statutes in question violate any provisions of the Constitution of the United States, this Court must accept the interpretation given those statutes by the Supreme Court of Montana.

Hicklin v. Coney, supra.

Huddleston, et al. v. Dyer, supra.

Richfield Oil Corporation v. State Board of Equalization, 329 U. S. 69, 61 Sup. Ct. 156, 91 L. Ed. 123.

Point C.

The Fees Prescribed by the Motor Carrier Act Are Not in Violation of the Commerce Clause of the Constitution of the United States.

In our opinion the most important federal question is whether either fee provided for in the Motor Carrier Act violates the commerce clause of the Constitution of the

United States (Art. 1, Sec. 8, Clause 3). Section 3847.16, Revised Codes of Montana, 1935, (App. 50) provides that:

"In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of public highways of this state."

every motor carrier shall pay a fee of \$10.00 per vehicle per year for each vehicle operated over or upon the highways of Montana, payable in advance of operation. Section 3847.27, Revised Codes of Montana, 1935, (App. 54) contains substantially the same statement as to purpose and fixes a fee of one-half of one percent of the gross revenue from operations in Montana, quarterly on the business of the previous quarter, subject to a minimum annual fee of \$15.00 per year per vehicle for each vehicle operated on Montana highways.

A state may impose upon vehicles used exclusively in interstate commerce a fair and reasonable tax for the privilege of using its highways. Such a tax levied on interstate carriers for hire is not inconsistent with the commerce clause of the Constitution of the United States.

Hendrick v. Maryland, *supra*.

Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. Ed. 222.

Clark v. Poor, 274 U. S. 554, 47 Sup. Ct. 702, 71 L. Ed. 1199.

Interstate Transit, Inc., v. Lindsey, 283 U. S. 183, 51 Sup. Ct. 380, 75 L. Ed. 953.

Aero Transit Co. v. Georgia Comm.; 295 U. S. 285, 55 Sup. Ct. 709, 75 L. Ed. 1439.

Morf v. Bingham, 298 U. S. 407, 56 Sup. Ct. 756, 80 L. Ed. 1245.

Dixie Ohio Express Co. v. State Revenue Commission, 306 U. S. 72, 59 Sup. Ct. 435, 83 L. Ed. 495.

Clark v. Paul Gray, Inc., 306 U. S. 583, 59 Sup. Ct. 744, 83 L. Ed. 1001.

Union Brokerage Co. v. Jensen, 322 U. S. 202, 64 Sup. Ct. 967, 88 L. Ed. 1227, 152 A. L. R. 1072.

The Fees Are Assessed for the Use of the Highways.

The Legislature of Montana has specifically declared that the fees provided in Sections 3847.16 and 3847.27, Revised Codes of Montana, 1935, (App. 50, '54) are "in consideration of the use of the public highways of this state." This is a proper purpose for which a fee may be laid on interstate carriers, and it was so held by the Montana Court. (R. 112, 118.) Whether or not the levy is for the use of the highways may be shown by the nature of the tax, such as a mileage tax, directly proportioned to the use of the highways, by the express allocation of the revenue to highway purposes, the manner of collection or any other method which will show that purpose.

Interstate Transit Inc., v. Lindsey, *supra*.

Aero Mayflower Transit v. Georgia Commission, *supra*.

Dixie Ohio Express Co. v. State Revenue Commission, *supra*.

Morf v. Bingham, *supra*.

Clark v. Paul Gray, Inc., *supra*.

There can be no more specific or affirmative declaration than that made by the legislature of Montana that the fees

are in consideration of the use of the highways. In addition Section 3847.16, Revised Codes of Montana, 1935, (App. 50) provides for a fee payable before the vehicle is operated on the highway. Such a condition is recognized as proper and as a showing that the fee assessed is for the use of the highways.

Morf v. Bingaman, supra.

Aero Mayflower Transit Co. v. State Revenue Commission, supra.

Dixie Ohio Express Co. v. State Revenue Commission, supra.

Clark v. Paul Gray, Inc., supra.

The fee assessed in Section 3847.27, Revised Codes of Montana, 1935, (App. 54) of one-half of one percent of gross revenue derived from operations in Montana is as clearly related to the use of highways as a mileage tax or a tax on the size of vehicles. It is a tax based on beneficial use of those highways. Beneficial use cannot be determined more accurately than by the amount of money received for that use. The tax, on its face, shows that it is levied for the use of the Montana highways.

Interstate Transit, Inc., v. Lindsey, supra.

Clark v. Poor, supra.

The fact that a minimum is prescribed is not injurious, as a legislative body may always specify a minimum. What has been said regarding the flat fee would generally be true in considering the effect of such a minimum.

The Use of the Money Is Immaterial.

Appellant places great reliance on the fact that none of the funds derived from the fees are used for highway purposes. Sections 3847.17 and 3847.28, Revised Codes of Montana, 1935, (App. 51, 54) provided that the fees should be placed in a fund designated as "Motor Carrier Fund" and used for the purpose of "defraying the expenses of administration of this act and the regulation of the business herein described." Thus as originally enacted the Motor Carrier Act limited the use of the funds to the expense of enforcing the act and the regulation of motor carriers. Use of funds derived from interstate carriers for such purposes is proper.

Morf v. Bingaman, supra.

Clark v. Paul Gray, Inc., supra.

In 1941 the legislature, by Chapter 14, Laws of 1941, provided that all funds received from motor carriers be placed in the General Fund of the State. (App. 55) Since that time funds for administration of the motor carrier act have been appropriated from the general fund. None of the funds have been devoted directly to highway construction or maintenance purposes. This fact is, however, immaterial. The use of funds for highway purposes is only one method of testing whether the fees are assessed for highway use. As this Court said in *Morf v. Bingaman, supra*:

"The use for highway maintenance of a fee collected from automobile owners may be of significance, when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways."

The fees being assessed for a proper purpose, it is immaterial whether the state places the fees collected in the highway fund or in some other fund. The state builds, maintains, supervises and polices the highways which appellant uses as a place of business, and whether it uses the funds paid by appellant or other funds for highway construction and maintenance is not appellant's concern.

Clark v. Poor, supra.

Morf v. Bingham, supra.

Dixie Ohio Express Co. v. State Revenue Commission, supra.

Appellant specifies as error the assumption of the Montana Court that the funds derived from the flat fee were exacted to build, maintain and supervise the highways of Montana and that the Court used such assumption to justify the levy (Spec. of Error A III, R. 146). This specification is apparently based on the single clause found in the concluding paragraph of the opinion (R. 119) where the Montana Court said: "The revenue collected is devoted to the building, repairing and policing of such highways." The statement contained in the first paragraph of Judge Cheadle's dissent (R. 119) is apparently based on the identical statement of the majority opinion.

An examination of the record and the opinion in its entirety will be sufficient to establish the fact that the Montana Court did not base its opinion on this statement of fact. No place in the record is there any showing of claim made by appellees that the funds were used for highway construction purposes. The position taken was that the levy was proper and the use made of the funds

was no concern of appellant. (Reply R. 50, 51.) The Montana Court had before it the statutes of Montana, and particularly Sections 3847.17, 3847.28, Revised Codes of Montana, 1935 (App. 51, 54) and Chapter 14, Laws of 1941 (App. 55) and was fully informed as to the facts. The statement of the Court shows that the contention that the fees were not used for highway purposes was before the Court. (R. 107.) This is further apparent when that Court said:

"Again it is contended that revenue is demanded from the company to be used to pay salaries of the Board members and other alleged unlawful purposes. We think a full and complete answer to all such contentions is found in the case of *Clark v. Poor*. . . ." (R. 117, 118.)

It is thus apparent that the Court knew the facts and made its decisions on them. The isolated statement relied on by appellant is found in the closing paragraph which deals with the distinction between certain types of cases. In view of the plain statement of the Court quoted above, it is clear that the isolated statement was not made for the purpose of justifying the Court's decision, or to confuse or befog the issues, and was not relied upon as a fact on which to base the opinion. It was an ill-advised statement but nevertheless harmless and unimportant, either to the Supreme Court of Montana or this Court. The clause could be entirely omitted without changing in the least the actual opinion of the Montana Court.

Appellant specifies as error the misapplication of the decision of this Court in *Clark v. Poor*, *supra*; *Interstate*

Transit v. Lindsey, supra; and *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 58 Sup. Ct. 510, 82 L. Ed. 734 (Spec. of Error A VIII. (R. 147.)

A study of the cases will show beyond doubt that the principles announced in those cases were applicable and correctly applied to the facts in the instant case. In *Clark v. Poor*, the state statute required the payment of fees from interstate carriers before operating on the highways of Ohio. The carrier contended that the act was in conflict with the commerce clause and likewise that the funds not being used on the highways imposed an unreasonable burden on interstate commerce. The Court outlined the rules as to when a tax could be levied on interstate commerce and upheld the state act. The Court declared that if the purpose of the levy was proper, the actual use of the money for purposes other than highways was immaterial. The Court refused to enjoin the state officials from enforcing the act. The facts in that case are nearly identical with those involved in this case.

In the *Interstate* case it is true that tax was held invalid, but the principles announced as to when a tax may be levied on interstate transportation are correct. The tax in that case was held invalid because it could not be determined that the tax was paid for the use of the highways, and thus became a privilege tax and a burden on interstate commerce. The *Barnwell* case, while it concerns the regulation of size of vehicles engaged in interstate traffic, contains a review of the previous declarations of this Court. The right of the state to levy taxes, fix regulations and control operations of interstate vehicles is reaffirmed, so

long as such regulation is non-discriminatory, reasonable and proper for the promotion of safety, or a levy for the use of the highways. Nothing said by this Court in any of these cases is contrary to the opinion of the Montana Court in this case. The principles announced were applied by the Montana Court.

Appellant apparently contends that because the money derived from the fees in the Montana statutes is not actually used for highway purposes, it is not a fee for the use of the highways and therefore becomes an occupation or privilege tax. This, of course, is not correct and the cases relating to occupation and privilege taxes are not applicable to the facts now before the Court. This Court has recently outlined the limits of taxation or regulation of interstate commerce. The principles announced in *Hendrick v. Maryland*, *supra*, and *Dixie Ohio Express Co. v. Revenue Commission*, *supra*, that a state may levy a fair and reasonable tax applicable to interstate commerce, for the use of its highways, so long as it is fixed by some uniform, fair and practical manner is recognized and reaffirmed.

Freeman v. Hewett, 329 U. S. 249, 67 Sup. Ct. 274, 91 L. Ed. 205.

Union Brokerage Co. v. Jensen, *supra*.

Congress, when it enacted the Motor Carrier Act, provided that nothing in the act shall be construed to affect the power of taxation of the several states (49 U. S. C. A. 302 B). The federal motor carrier act was enacted in 1935 after the passage of the Montana Act. Because of the specific statement of Congress that the right of taxation by the states is not affected, the states have the same

right of taxation as before the passage of the federal act. The nature and purpose of the taxes which may be levied on interstate carriers by the states, without violating the commerce clause, has been fully determined by this Court. The taxes involved in the instant case are within the limits defined as proper.

The Fees Are Not Unreasonable.

It is of course recognized that any tax on regulation of interstate carriers involves a burden on such commerce. So long as the state action does not impose an unreasonable burden and does not discriminate against interstate commerce, the burden is one which the Constitution of the United States permits.

South Carolina State Highway Dept. v. Barnwell Bros., 303 U. S. 177, 58 Sup. Ct. 510, 82 L. Ed. 734.

The fee involved in *Aero Mayflower Transit Co. v. Georgia Comm.*, supra, was a flat fee of \$25.00 per vehicle on carriers for hire in Georgia. The fee in the *Dixie Ohio Express Co. v. State Revenue Comm.*, supra, was a minimum flat fee of \$50.00 per vehicle on vehicles transporting for hire in Georgia and is in addition to the fee considered in the Aero case. These fees and the fees considered in other cases were payable before the vehicles were operated in the states. The flat fee in the instant case is \$10.00 per vehicle. (Section 3847.16, App. 50) The gross revenue fee (Section 3847.27, App. 54) considered as a minimum fee is \$15.00 per vehicle for contract or Class C carriers, such as appellant. For the minimum fee of

\$25.00 per vehicle per year the appellant can do business returning an average of \$3,000.00 per vehicle for operations on Montana highways. If the business exceeds the \$3,000.00 per vehicle the additional fee for appellant would amount to one-half of one percent of the gross revenue in excess of that amount received from operations on Montana highways. Similar or greater fees have been sustained by this Court and have been declared not to be an unreasonable or forbidden burden on interstate commerce.

Kane v. New Jersey, supra.

Clark v. Poor, supra.

Aero Transit Co. v. Georgia Comm., supra.

Morf v. Bingaman, supra.

Dixie Ohio Express Co. v. State Revenue Comm., supra.

The appellant cannot challenge the reasonableness of the fees because it does not make the use of the highways permitted by the fees exacted. The flat fee of \$10.00 is made without limitation of the use of the highways. The gross revenue fee, until the revenue on Montana highways equals an amount sufficient so that the percentage will equal the minimum, is a tax of the same nature. This Court has said, in *Aero Transit v. Georgia Comm., supra*:

"The fee is for the privilege for a use as extensive as the carrier wills that it shall be. . . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may."

Kane v. New Jersey, supra.

Clark v. Poor, supra.

Hicklin v. Coney, supra.

Morf v. Bingaman, supra.

After the revenue of the carrier is sufficient so that the percentage tax on gross revenue equals or exceeds the minimum fees there can be no question that the gross revenue tax is related to the beneficial use made of the highways of Montana. (R. 117.) There is no showing in the record that either fee prescribed is unreasonable in amount. The Montana Court followed the rules laid down by this Court that the burden is on the carrier to show wherein the exactions are unlawful to him. (R. 113.)

Hendrick v. Maryland, supra.

Kane v. New Jersey, supra.

Morf v. Bingaman, supra.

Dixie Ohio Express Co. v. State Revenue Comm., supra.

Clark v. Paul Gray, Inc., supra.

Neither fee involved in the case at bar is unreasonable in amount and does not prohibit interstate commerce. The fees are levied for a proper purpose. This being true, the amount of the charges and method of determination are matters for state determination. This principle was followed by the Montana Court (R. 112, 117). This Court, in *South Carolina State Highway Department v. Barnwell Bros., supra*, said:

“When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for

the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. *Jacobson v. Massachusetts*, 197 U. S. 11, 30; *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 365; *Price v. Illinois*, 238 U. S. 446, 451; *Hadacheck v. Sebastain*, 239 U. S. 394, 408-414; *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 530; *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 388; *Zahn v. Board of Public Works*, 274 U. S. 325, 328; *Standard Oil Co. v. Marysville*, 279 U. S. 582, 584. This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. *Morris v. Duby*, *supra*, 143; *Sproles v. Binford*, *supra*, 389, 390; *Minnesota Rate Cases*, *supra*, 399, 400; *Smith v. St. Louis & S. W. R. Co.*, 181 U. S. 248, 257; *Reid v. Colorado*, 187 U. S. 137, 152; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 42, 43.

Travelers Ins. Co. v. Conn., 185 U. S. 364, 22 Sup. Ct. 673, 46 L. Ed. 949.

Dixie Ohio Express Co. v. State Revenue Comm., *supra*, and cases cited.

Neither the flat fee of \$10.00 per vehicle per year prescribed in Section 3847.16, Revised Codes of Montana, 1935, (App. 50) nor the gross revenue fee in Section 3847.27, Revised Codes of Montana, 1935, (App. 54) derived from operations on Montana highways measured by percentage and subjected to an annual minimum fee per vehicle, is unreasonable in amount. Neither fee prohibits interstate commerce or constitutes a burden forbidden by the commerce clause of the Constitution of the United States.

**The Question of Apportionment of Interstate and
Interstate Revenue Is Not Involved or Material.**

Appellant contends that the gross revenue fee statute (Section 3847.27, Revised Codes of Montana, 1935, App. 54) violates the commerce clause because no method of apportionment of the gross revenue derived from operations in Montana and gross revenue elsewhere is given or established. They also contend that being engaged solely in interstate commerce there is no business done in Montana and the tax is actually a tax on interstate commerce.

We have previously considered the decision of the Montana Supreme Court that gross operating revenue means gross revenue derived from operations in Montana. We have shown also that gross operating revenue means the revenue received by the company for business done on Montana highways. It makes no difference where the money is paid, or that the shipment is entirely interstate as the tax is on revenue received for operations over Montana highways. When a charge is made for transportation over Montana highways, there is operating revenue from that operation. Appellant confuses gross receipts or gross income and gross revenue derived from operations over Montana highways.

Appellant's contention that the act is unconstitutional because it taxes revenue without apportionment between interstate and intrastate revenue is apparently based on the false premise that the tax is not charged as compensation for the use of the highways. We have already shown that the tax is assessed for use of the highways

and is a proper tax under the decisions of this Court. Because the money received is not directly used for highway work, appellant contends that it is not charged for the use of the highway, but is in the nature of occupation or gross business tax. *Adams Mfg. Co. v. Stoner*, 304 U. S. 307, 58 Sup. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429; *Western Livestock v. Bureau of Revenue*, 303 U. S. 250, 58 Sup. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944; *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 59 Sup. Ct. 325, 83 L. Ed. 272; *Gooney v. Mountain States Tel. & Tel. Co.*, 294 U. S. 384, 55 Sup. Ct. 477, 79 L. Ed. 934; and similar cases are relied on as authority for the fact that a tax cannot be levied on interstate commerce and that where there is not a fair apportionment between revenue derived from interstate and intrastate business an act is invalid. An examination of these cases shows that they do not involve fees as compensation for use of highways and that they are not applicable to the facts presented here. As has been pointed out above a fair and reasonable tax as compensation for use of its highways may be levied by a state, even on interstate carriers. The applicable principles to the case at bar are stated in *Dixie Ohio Express Co. v. Revenue Comm.*, *supra*, when it is stated:

"It is elementary that a state may not impose a tax on the privilege of engaging in interstate commerce. (citing authorities.) But, consistently with the commerce clause, a state may impose upon vehicles *used exclusively for interstate commerce transportation* a fair and reasonable tax as compensation for the privilege of using its highways for that purpose. . . . The amount of the charges and the method of collections are primarily for determination by the state itself; and so long as they are reasonable

and are fixed according to some uniform, fair and practical standard, *they constitute no burden on interstate commerce.* (citing authorities.) While ordinarily state action is deemed valid unless the contrary appears, we have held that to sustain a charge for *the use or privilege of using its roads for interstate transportation*, it must affirmatively appear that *the charge is exacted as compensation*, or to pay the cost of policing its highways. (citing authorities.)" (Emphasis ours.)

Clark v. Poor, supra.

Aero Transit Co. v. Georgia Comm., supra.

Morf v. Bingaman, supra.

Whether the tax is on mileage traveled or revenue received from operations on Montana highways, or a flat fee on vehicles, or some other method, is immaterial. The principle is the same, so long as the tax is fair, reasonable and non-discriminatory and for a proper purpose, the amount of the charges and method of collection are matters primarily for the determination of the legislative branch of the state government.

Travelers Inc. Co. v. Conn., supra.

Dixie Ohio Express Co. v. Revenue Comm., supra.

South Carolina Highway Dept. v. Barnwell Bros., supra.

The Montana Court was right in holding that these sections were applicable to appellant and that it should be enjoined from operations in Montana until it complied with the law applicable (R. 119).

Interstate commerce cannot be prevented or unduly hampered by discriminatory legislation, but one desiring

to engage in such commerce must comply with reasonable laws providing for regulation or taxation, not in violation of the United States Constitution or statutes, by the states in which he operates. If he fails to comply with such laws, injunction is a proper remedy to insure against operation in violation of the law. The order of the Court will be complied with when appellant complies with the applicable statutes.

Point D.

The Fees Exacted by the Montana Statutes Do Not Violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment.

The fees prescribed by Sections 3847.16 and 3847.27, Revised Codes of Montana, 1935, (App. 50, 54) are applied alike to the business of the intrastate carrier and the business of the interstate carrier in Montana. They are fixed according to a uniform, fair and practical standard. The Montana Act is not hostile to interstate commerce and as the Montana Court rightly held.

Travelers Ins. Co. v. Conn., supra.

South Carolina State Highway Comm. v. Barnwell Bros., supra.

Dixie Ohio Express Co. v. State Revenue Comm., supra.

The contention of discrimination against interstate carrier can only be justified if the gross revenue fee were applicable to income or revenue not earned on Montana highways. The Montana Court has decided that the gross revenue to be considered in computing the tax under section 3847.27 is revenue derived from operations in Mont-

tana. (R. 115.) The argument of discrimination falls within the determination of the Montana Court. The appellant is required to pay the identical fee which purely intrastate carriers pay. No other state can levy a tax on the same revenue. The fees levied do not offend against the Fourteenth Amendment to the Constitution of the United States. A tax on revenue from business done over highways of other states would, of course, be invalid. Likewise a tax will not be sustained if a similar tax could be laid on the same revenue by one or more additional states. The tax in this case is only for the privilege granted for the use of Montana highways. The gross revenue fee is applicable only to revenue derived from operations on Montana highways. While other states may tax appellant for the use made of their highways in some appropriate manner, the tax cannot be levied on the revenue derived from operations on Montana highways or the privilege granted for use of those highways. All danger of double taxation is avoided.

Western Livestock v. Bureau of Revenue, supra.

The contention that the Montana Act requiring the payment of additional taxes by carriers for hire is repugnant to the equal protection clause of the Fourteenth Amendment is without merit. The same or similar taxes have been sustained against objections that they violate the Fourteenth Amendment of the United States Constitution.

Kane v. New Jersey, supra.

Dixie Ohio Express Co. v. Revenue Comm., supra.

Clark v. Paul Gray, Inc., supra.

The interstate carrier can obtain from the appellee Board right to engage in the business authorized by the Interstate Commerce Commission on Montana highways as a matter of right, and without proof of public convenience or necessity. (Section 3847.23, Revised Codes of Montana, 1935, App. 53) After obtaining such right, the interstate carrier is subject to the same regulations and fees as the intrastate carrier, for the identical class of operations over the highways of Montana, nothing more, nothing less. As the Montana Court held, (R. 114, 117) there is no showing of discrimination or hostility to interstate commerce. If the taxes do not constitute an unreasonable or forbidden burden on interstate commerce, under the commerce clause, (Article 1, Section 8, Clause 3, U. S. Const.), and we do not believe they do, do not discriminate against the interstate carrier or forbid it the right to engage in such service in violation of the Fourteenth Amendment to the Constitution of the United States, they may be forced against the interstate carrier.

Travelers Ins. Co. v. Conn., supra.

Kane v. New Jersey, supra.

Clark v. Poor, supra.

Aero Transit Co. v. Georgia Comm., supra.

South Carolina Highway Dept. v. Barnwell Bros., supra.

Western Livestock v. Bureau of Revenue, supra.

Dixie Ohio Express Co. v. Revenue Comm., supra.

Clark v. Paul Gray, inc., supra.

Numerous cases cited by appellant relate to the application of occupation taxes, use taxes, or inspection taxes

of transportation agencies or utilities applied to interstate commerce. Those cases are not applicable and have not been discussed in detail. In none of the cases of that type is the fee charged as compensation for the use of a facility such as highways, owned, constructed and maintained by the state as a place on which to conduct a business. A reasonable and fair tax as compensation for the use of the highways is not considered a forbidden burden on interstate commerce. This distinction was recognized by the Supreme Court of Montana (R. 118).

Montana Highway License Fees Are Not Involved.

Appellant seeks to show by argument that the taxes here involved cannot be considered as "in lieu of ad valorem taxes" on its trucks. It is argued that its trucks are subject to the same ad valorem taxes as are trucks used entirely intrastate. Section 1759, Revised Codes of Montana, 1935, as amended by Chapter 72, Laws of Montana, 1937, and Section 1760.7, Revised Codes of Montana, 1935, as amended by Chapter 296, Laws of Montana, 1947, are cited in substantiation of its argument.

A reading of these statutes clearly shows their inapplicability and immateriality to the questions at issue here. For the information and guidance of the Court, Section 1760.7, supra, is appended. (App. 57)

Section 1760.7, Revised Codes of Montana, 1935, as amended by Chapter 296, Laws of Montana, 1947, is a reciprocity act and clearly provides in part:

"... that the registrar of motor vehicles is authorized and empowered to enter into reciprocal

agreements with any country, state or territory, exempting from registration and licensing in Montana *the foreign licensed* motor vehicles; trailer or semi-trailer of a resident of such country, state or territory when lawfully registered and licensed therein, when the laws of such country, state or territory extend the same privilege to, or authorize like reciprocal agreements with respect to motor vehicles, trailers and semi-trailers registered and licensed in the state of Montana and operated by a resident of this state upon the highways of such country, state or territory . . ."
(Emphasis ours.)

By this language it is clear as to foreign owned motor vehicles, it was not intended that the license fees and taxes provided by these statutes were not to be compensation for use of highways by for-hire carriers.

CONCLUSION

It is therefore respectfully submitted that the decision of the Montana Supreme Court, that fees prescribed by the Motor Carrier Act are applicable to interstate carriers for their operations on Montana highways, and that the gross revenue fees are payable on gross revenue derived from operations on Montana highways, is a correct interpretation of the Montana statutes. In any event, the decision of the highest court of the state is in the interpretation of state statutes final and binding on this Court. We submit that the fees prescribed by the Montana Motor Carrier Act are levied for the proper purpose of compensation for the use of the highways, are fair, reasonable and non-discriminatory, and their application to interstate carriers does not constitute a forbidden burden on interstate com-

merce, in violation of the commerce clause, or violate the due process or equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The decision of the Supreme Court of Montana correctly applies the principles firmly established by this Court in holding the fees prescribed by Montana statutes, applicable to the operations of appellant, and the decision should be affirmed.

Respectfully submitted,

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APPENDIX

STATUTES

SECTION 3847.16, REVISED CODES OF MONTANA, 1935 (being also Section 16, Chapter 184, Laws of the Twenty-Second Legislative Assembly of the State of Montana, 1931):

"Annual Fee for Motor Carriers—Fee for Seasonal Operators—Compliance Required of Motor Carriers Operating in More Than One State—Revocation of Certificate for Failure to Pay Fees—Lien of Fees and Charges.

"(a) In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of the public highways of this state, every motor carrier, as defined in this act, shall, at the time of the issuance of a certificate and annually thereafter, on or between the first day of July and the fifteenth day of July, of each calendar year, pay to the board of railroad commissioners of the state of Montana the sum of ten dollars (\$10.00), for every motor vehicle operated by the carrier over or upon the public highways of this state.

"Provided, that a motor carrier engaged in seasonal operations only, where its said operations do not extend continuously over a period of not to exceed six (6) months in any calendar year, shall only be required to pay compensation and fees in a sum equal to one-half ($\frac{1}{2}$) of the compensation and fees herein provided, and, provided further, that the compensation and fees herein imposed shall not apply to motor vehicles maintained and used by a motor carrier as standby or emergency equipment. The board shall have the power and it is hereby made its duty to determine what motor vehicles shall be classed as standby or emergency equipment.

"(b) When transportation service is rendered partly in this state and partly in an adjoining state or foreign country, motor carriers shall comply with the provisions of this act relating to the payment of compensation and to the making of annual or special reports or statements

herein required, and shall show the total business performed within the limits of this state and such other information concerning its operation within this state as may be required by the board as fully and completely and in the same manner as herein required of motor carriers operating wholly within this state.

"(c) Upon the failure of any motor carrier to pay such compensation, when due, the board may in its discretion revoke the carrier's certificate or privilege and no carrier whose certificate or privilege is so revoked shall again be authorized to conduct such business until such compensation shall be paid.

"(d) All compensation, fees, or charges, imposed and accruing under the provisions of this act, shall be a lien upon all property of the motor carrier used in its operations under this act; said lien shall attach at the time the compensation, fees, or charges become due and payable, and shall have the effect of an execution duly levied on such property of the motor carrier and shall so remain until said compensation, fees, or charges are paid or the property sold for the payment thereof."

SECTION 3847.17; REVISED CODES OF MONTANA, 1935 (being also Section 17, Chapter 184, Laws of the Twenty-Second Legislative Assembly of the State of Montana, 1931):

"Motor Carrier Fund — Composition — Use. All of the fees and compensation charges collected by the board under the provisions of this act shall be transmitted to the state treasurer who shall place the same to the credit of a special fund designated as 'motor carrier fund'; such fund shall be available for the purpose of defraying the expenses of administration of this act and the regulation of the business herein described, and shall be cumulative from year to year. All expenses of whatsoever kind or nature of the board incurred in carrying out the provisions of this act shall be audited by the state board of examiners and paid out of the 'motor carrier fund.' Such fund shall not come within the restriction of any law of this state governing payment of expense incurred in a pre-

vious year, it being intended that such fund shall be applied to the payment of any necessary costs or expenses in carrying out the provisions of this act, whether incurred during the ensuing year or previous fiscal years, and such 'motor carrier fund' or accumulations thereof, are hereby appropriated for the payment of the costs and expenses rendered necessary in the carrying out of the provisions of this act." (This section is repealed by Chapter 14, Laws of the Twenty-Seventh Legislative Assembly, 1941.)

SECTION 3847.18, REVISED CODES OF MONTANA, 1935 (being also Section 18, Chapter 184, Laws of the Twenty-Second Legislative Assembly of the State of Montana, 1931):

"Records of Motor Carriers to be Open for Inspection by Board — System of Accounts to be Prescribed — Reports Required. All records, books, accounts and files of every class A and B motor carrier in this state, so far as the same shall relate to the business of transportation conducted by such motor carrier, shall at all times be subject to examination by the board or by any authorized agent or employee of the board. The board shall prescribe a uniform system of accounts and uniform reports covering the operations of such class A and class B motor carriers and every motor carrier authorized to operate as such in accordance with the provisions of this act shall keep its records, books, and accounts according to such uniform system, insofar as possible. On or before the fifteenth day of July of each year, every motor carrier authorized to engage in such business shall file with the board a report, under oath. In addition to such annual reports every motor carrier shall prepare and file with the board, at the time or times and in the form to be prescribed by the board, annual reports, special reports and statements giving to the board such information as it shall require in order to perform its duties under this act."

SECTION 3847.23, REVISED CODES OF MONTANA, 1935 (being also Section 16, Chapter 184, Laws of the Twenty-Second Legislative Assembly of the State of Montana, 1931):

"Application of Act to Interstate Carriers and Motor Carriers Operating in National Parks. The terms and provisions of this act shall apply to commerce with foreign nations, and to commerce among the several states of this Union, insofar as such application may be permitted under the provisions of the constitution of the United States, treaties made thereunder and the acts of Congress; provided that it shall not be necessary for an interstate or international motor carrier, in order to obtain a permit as herein provided, to make any showing of public convenience and necessity; except as to the transportation of passengers and/or freight between points within this state, the power to regulate such operation being specifically reserved herein; and provided further, the board is hereby authorized to exercise any additional power that may from time to time be conferred upon the state by any act of Congress, and provided further, that any motor carrier operating in and about any national park, whose rates and methods of accounting are controlled by contract with the United States, shall not be subject to any regulation by the commission in conflict with such contract or in conflict with any regulation by the United States made pursuant to such contract or made pursuant to an act of Congress of the United States."

SECTION 3847.24, REVISED CODES OF MONTANA, 1935 (being also Section 16, Chapter 184, Laws of the Twenty-Second Legislative Assembly of the State of Montana, 1931):

"Invalidity of Part of Act Not to Affect Remainder. If any section, subsection, sentence, clause or phrase of this act is for any reason held unconstitutional, such decision shall not affect the validity of the remaining portions of this act. The legislative assembly declares that it would have passed this act and each section, subsection, sentence, clause and phrase irrespective of the fact that

one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional."

SECTION 3847.27, REVISED CODES OF MONTANA, 1935 (being also Section 2, Chapter 108, Laws of the Twenty-Fourth Legislative Assembly of the State of Montana, 1935):

"Additional Fees Governing Motor Carriers. In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall between the first and fifteenth days of January, April, July and October of each year, file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one percent of the amount of such gross operating revenue; provided, however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars. (\$30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars (\$15.00)."

SECTION 3847.28, REVISED CODES OF MONTANA, 1935 (being also Section 3, Chapter 100, Laws of the Twenty-Fourth Legislative Assembly of the State of Montana, 1935):

"Disposition Made of Fees. All fees collected from motor carriers shall be, by the commission, paid into the state treasury and shall be, by the state treasurer, placed to the credit of the motor carrier fund. All other fees and charges collected by the commission under the provisions of this act shall be by the commission paid into the state treasury and shall be by the state treasurer placed to the credit of a fund to be known as the 'public service commission fund,' and the general and contingent expenses

of the public service commission shall be by the state treasurer paid out of said public service commission fund upon presentation of duly verified claims therefor, which claims shall have been approved by the commission and audited by the state board of examiners."

SESSION LAWS

SECTION 2, CHAPTER 14, LAWS OF THE TWENTY-SEVENTH LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA, 1941:

"That all moneys collected or received by or paid over to the board of railroad commissioners of Montana, public service commission of Montana, state board of health, milk control board, state auditor and insurance commissioner ex-officio, under the provisions of Section 2761, Revised Codes of Montana, 1935, department of agriculture, labor and industry, or any of the bureau, divisions, officers or employees of any thereof, and to the state examiner and state forester, by way or on account of fees, licenses, or for any other purpose, on and after July 1, 1941, shall be paid over to the state treasurer who shall deposit the same to the credit of the general fund of the State."

SECTION 10, CHAPTER 14, LAWS OF THE TWENTY-SEVENTH LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA, 1941:

"That sections 2295.28, 2303.12, 2355.9, 2408.9, 2815.157, 3645, 10400.44, 10400.49, Revised Codes of Montana, 1935, Section 29, Chapter 84, Section 7 of Chapter 91; Subsection 1 of Section 11 of Chapter 87, Section 9 of Chapter 94, Section 11 of Chapter 199 and Section 7 of Chapter 201 Session Laws of Montana, 1937, and all other acts and parts of acts in conflict herewith are hereby repealed; it being the purpose and intent of this act that the licenses, fees, taxes and revenues specifically enumerated and described in Sections 1, 2 and 3 of this act shall be deposited by the state treasurer to the credit of the state general fund and that no money shall be drawn from such fund but in pursuance of specific appropriations made

by law, in conformity with the provisions of Section 10 of Article XII of the Constitution of the State of Montana." (This and the preceding section repeal Sections 3847.17 and 3847.28, Revised Codes of Montana, 1935, set forth above.)

SECTION 2, CHAPTER 73, LAWS OF THE THIRTIETH LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA, 1947:

"That Section 3847.27, of the Revised Codes of Montana of 1935 be, and the same is hereby amended to read as follows:

"3847.27. Additional Fees. Covering Motor Carriers. In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity ~~or permit~~ issued by the *Board of Railroad Commissioners*, shall between the first and fifteenth days of January, April, July and October of each year, file with the *Board of Railroad Commissioners* a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one per cent of the amount of such gross operating revenue, *and in the event that such carrier operates in interstate commerce, the gross operating revenue of such carrier within this state shall be deemed to be all the revenue received from business beginning and ending within this state, and a proportion based upon the proportion of the mileage within this state to the entire mileage over which the business is done of revenue on all business passing through, into or out of this state;* provided, however, that the minimum fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars (\$30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered, and/or operated under the motor carrier act shall be fifteen dollars (\$15.00)." (The emphasized portions in the

above section designate the words added or changed by the amendment.)

SECTION 2, CHAPTER 296, LAWS OF THE THIRTIETH LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA, 1947:

"Section 1. Section 1760.7 Revised Codes of Montana, 1935, as amended by Chapter 93, Laws of the twenty-sixth legislative assembly of Montana, 1939, shall be, and the same is hereby amended to read as follows:

"Section 1760.7. Foreign Vehicles Used in Gainful Occupation — Registrar of Motor Vehicles May Make Reciprocal Agreements to Exempt. Before any foreign licensed motor vehicle shall be operated on the highways of this state for hire, compensation or profit, or before the owner thereof uses the vehicle while engaged in gainful occupation or business enterprise, in the State of Montana, including highway work, the owner of such vehicle shall make application to a county treasurer for registration, upon an application form furnished by the registrar of motor vehicles. Upon satisfactory evidence of ownership submitted to such county treasurer, the treasurer shall accept the application for registration and shall collect the regular license fee required for the vehicle. The treasurer shall thereupon forward to the registrar of motor vehicles such application form. The treasurer shall at the same time issue to the applicant the proper license plates or other identification markers, which shall at all times be displayed upon such vehicle, when operated or driven upon roads and highways of this state, during the period of the life of such license. Upon receipt of the application for registration, the registrar of motor vehicles shall issue to the owner of the vehicle a registration receipt. This registration receipt shall not constitute evidence of ownership, but shall only be used for registration purposes. No Montana certificate of title shall be issued for this type of registration, providing, however, that the registrar of motor vehicles is authorized and empowered to enter into reciprocal agreements with any country, state or territory, exempting from registration and licensing in Montana the foreign licensed motor vehicle, trailer or

semi-trailer of a resident of such country, state or territory when lawfully registered and licensed therein, when the laws of such country, state or territory extend the same privilege to, or authorize like reciprocal agreements with respect to motor vehicles, trailers and semi-trailers registered and licensed in the State of Montana and operated by a resident of this state upon the highways of such country, state or territory; provided, however, that this act shall not be construed to permit any owner of a motor vehicle who is a resident of the State of Montana, or any owner or operator of a motor vehicle whose motor vehicle operations are carried on principally within the State of Montana, registering and licensing such vehicle in any such country, or state or territory, and operating said foreign registered and licensed vehicle on the highways of Montana bearing such foreign license, under the terms of any such agreement. If any Montana resident owner, or operator of any motor vehicle, as above stated, shall attempt or accomplish such prohibited registration or licensing, he shall be guilty of a misdemeanor, and upon conviction thereof any motor vehicles by him owned shall not thereafter be registered or licensed by the registrar of motor vehicles of the State of Montana, and any operations with said vehicles over the highways of this state shall be enjoined upon complaint of any county attorney of any county of this state."

SUPREME COURT OF THE UNITED STATES

No. 39.—OCTOBER TERM, 1947.

Aero Mayflower Transit Company,	} Appeal From the Supreme Court of the State of Montana.
Appellant,	
v.	
Board of Railroad Commissioners of the State of Montana, et al.	

[December 8, 1947.]

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

Again we are asked to decide whether state taxes as applied to an interstate motor carrier run afoul of the commerce clause, Art. I, § 8, of the Federal Constitution.

Two distinct Montana levies are questioned. Both are imposed by that state's Motor Carriers Act, Rev. Codes Mont. (1935) §§ 3847.1-3847.28. One is a flat tax of \$10 for each vehicle operated by a motor carrier over the state's highways, payable on issuance of a certificate or permit, which must be secured before operations begin, and annually thereafter. § 3847.16 (a).¹ The other is a quarterly fee of one-half of one per cent of the motor carrier's "gross operating revenue," but with a minimum annual fee of \$15 per vehicle for class C carriers, in which

¹ The section was enacted originally as Mont. Laws, 1931, c. 184, § 16. Textually it is as follows: "(a) In addition to all of the licenses, fees or taxes imposed upon motor vehicles in this state, and in consideration of the use of the public highways of this state, every motor carrier, as defined in this act, shall, at the time of the issuance of a certificate and annually thereafter, on or between the first day of July and the fifteenth day of July, of each calendar year, pay to the board of railroad commissioners of the state of Montana the sum of ten dollars (\$10.00), for every motor vehicle operated by the carrier over or upon the public highways of this state"

In further relation to issuance of the permit, see note 5.

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group appellant falls. § 3847.27.² Each tax is declared expressly to be laid "in consideration of the use of the highways of this state" and to be "in addition to all other licenses, fees and taxes imposed upon motor vehicles in this state."

Prior to July 1, 1941, the fees collected pursuant to §§ 3847.16 (a) and 3847.27 were paid into the state treasury and credited to "the motor carrier fund."³ After that date, by virtue of Mont. Laws, 1941, c. 14, § 2, they were allocated to the state's general fund.

Appellant is a Kentucky corporation, with its principal offices in Indianapolis, Indiana. Its business is exclusively interstate. It consists in transporting household goods and office furniture from points in one state to destinations in another. Appellant does no intrastate

² This section originally was Mont. Laws, 1935, c. 100, § 2. It reads as follows: "In addition to all other licenses, fees and taxes imposed upon motor vehicles in this state and in consideration of the use of the highways of this state, every motor carrier holding a certificate of public convenience and necessity issued by the public service commission, shall between the first and fifteenth days of January, April, July and October of each year, file with the public service commission a statement showing the gross operating revenue of such carrier for the preceding three months of operation, or portion thereof, and shall pay to the board a fee of one-half of one percent of the amount of such gross operating revenue; provided, however, that the minimum annual fee which shall be paid by each class A and class B carrier for each vehicle registered and/or operated under the provisions of the motor carrier act shall be thirty dollars (\$30.00) and the minimum annual fee which shall be paid by each class C carrier for each vehicle registered and/or operated under the motor carrier act shall be fifteen dollars (\$15.00)."

Section 3847.2, Rev. Codes Mont. (1935), contains the definitions of the three classes of carriers.

³ The moneys in the motor carrier fund were subject to appropriation for use in supervision and regulation of many activities other than those connected with the public highways. See Rev. Codes Mont. (1935), §§ 3847.17, 3847.28; and cf. note 1b.

business in Montana. The volume of its interstate business there is continuous and substantial, not merely casual or occasional.⁴ It holds a certificate of convenience and necessity issued by the Interstate Commerce Commission, pursuant to which its business in Montana and elsewhere is conducted.

In 1935 appellant received a class C permit to operate over Montana highways, as required by state law.⁵ Until 1937, apparently, it complied with Montana requirements, including the payment of registration and license plate fees for its vehicles operating in Montana and of the 5¢ per gallon tax on gasoline purchased there.⁶ However, in 1937 and thereafter appellant refused to pay the flat \$10 fee imposed by § 3847.16 (a) and the \$15 minimum "gross revenue" tax laid by § 3847.27. In consequence, after hearing on order to show cause, the appellee board⁷ in 1939 revoked the 1935 permit and brought

⁴ Appellant's answer and cross-complaint set forth statistics concerning its use of Montana highways during the years 1937, 1938 and 1939. The figures show appellant's equipment operating on Montana highways during 227 days in 1937; 385 trucking days in 1938; and 405 trucking days in 1939. See also note 6.

⁵ The statute was Mont. Laws, 1931, c. 184, § 23, now Rev. Codes Mont. (1935), § 3847.23. The section applied the act of which it was a part to interstate and foreign commerce "insofar as such application may be permitted under the provisions of" the Federal Constitution, treaties and acts of Congress, but expressly exempted interstate carriers from making "any showing of public convenience and necessity" in order to secure the certificate or permit.

⁶ These taxes were imposed separately from the two involved in this case. Appellant's brief states the registration and license plate fees increased from \$660.50 in 1937 to \$1,212.50 in 1938 and to \$1,630.50 in 1939. The gasoline tax increased from \$745.30 in 1937 to \$1,257.90 in 1938 and \$1,649.98 in 1939. The gallonage tax, though ultimately borne by the consumer, was laid on the sale and collected from the dealer.

⁷ It should be noted that "the board of railroad commissioners," as used in § 3847.16 (a); and "the public service commission," as used in § 3847.27, designate a single body, invested with regulatory power

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this suit in a state court to enjoin appellant from further operations in Montana.

Upon appellant's cross-complaint, the trial court issued an order restraining the board from enforcing the "gross revenue" tax laid by § 3847.27. But at the same time it enjoined appellant from operating in Montana until it paid the fees imposed by § 3847.16 (a). On appeal the state supreme court held both taxes applicable to interstate as well as intrastate motor carriers and construed the term "gross operating revenue" in § 3847.27 to mean "gross revenue derived from operations in Montana." It then sustained both taxes as against appellant's constitutional objections, state and federal. Accordingly, it reversed the trial court's judgment insofar as the "gross revenue" tax had been held invalid, but affirmed the decision relating to the flat \$10 tax. — Mont. —, 172 P. 2d 452.

We put aside at the start appellant's suggestion that the Supreme Court of Montana has misconstrued the state statutes and therefore that we should consider them, for purposes of our limited function, according to appellant's view of their literal import. The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes by the state courts.⁹ Accordingly, we ac-

over various public utilities in addition to motor carriers, *e. g.*, railroads, common carriers of oil, etc. By Rev. Codes Mont. (1935), § 2880, "The board of railroad commissioners . . . shall be ex officio the public service commission hereby created . . ." The two terms were said by the Montana Supreme Court in this case to be "used interchangeably." — Mont. —, —, 172 P. 2d 452, 461.

⁹ This judicial construction was embodied in an amendment to the section made by Mont. Laws, 1947, c. 73, § 2.

¹⁰ *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459; *Huddleston v. Dwyer*, 322 U. S. 232; *Minnesota v. Probate Court*, 309 U. S. 270; *Morehead v. N. Y. ex rel. Tipaldo*, 298 U. S. 587; cf. *Erie R. Co. v. Tompkins*, 304 U. S. 64.

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cept the state court's rulings, insofar as they are material, that the two sections apply alike to interstate and intra-state commerce and that "gross operating revenue" as employed in § 3847.27 comprehends only such revenue derived from appellant's operations within Montana, not outside that state.¹⁰

Moreover, since Montana has not demanded or sought to enforce payment by appellant of more than the flat \$15 minimum fee for class C carriers under § 3847.27,¹¹ we limit our consideration of the so-called "gross revenue" tax to that fee. This too is in accordance with the state supreme court's declaration: "Even if it be admitted that the manner of arriving at a sound basis upon which the tax on gross revenue [should be calculated] is not provided by the statute, a contention to which we do not agree, no difficulty would arise in putting into effect

¹⁰ Acting not only in the view that statutes are presumptively constitutional and, if necessary, are to be so construed as to make them so, the court noted that § 3847.16 (b) expressly provides that, when service "is rendered partly in this state and partly in an adjoining state or foreign country," carriers "shall comply with the provisions of this act" concerning "payment of compensation" and making reports by showing "the total business performed *within the limits of this state*." (Emphasis added.) Accordingly it held that §§ 3847.27 and 3847.16 should be read together and the limitation of § 3847.16 (b) "within the limits of this state" thus became a part of § 3847.27 as well as § 3847.16 (a). — Mont. —, —, 172 P. 2d 452, 460.

¹¹ Appellant's vice president and general manager, Wheating, testified that for purposes of applying § 3847.27 he had calculated, for each of the years 1939 through 1942, "the [gross] income for that operation of the load miles operated in Montana by using an average income per mile figure based upon the probable load factor we would have had in Montana." (Emphasis added.) On this basis the amount of the tax as calculated at one-half of one per cent quarterly was substantially below the statutory minimum for each of the four years. See note 19. These figures apparently were reported to and accepted by the board as the basis for its demands upon the taxpayer for the flat \$15 minimum annual tax.

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the minimum fee of \$15.00 required for each company vehicle operated within the state."¹² Although the state court did not concede that the statute comprehended no workable or sound basis for calculating the tax above the minimum, we take this statement as a clear declaration that it would sustain the minimum charge even if for some reason the amount of the tax above the minimum would have to fall.

With the issues thus narrowed, we have, in effect, two flat taxes, one for \$10, the other for \$15, payable annually upon each vehicle operated on Montana highways in the course of appellant's business, with each tax expressly declared to be in addition to all others and to be imposed "in consideration of the use of the highways of this state."

Neither exaction discriminates against interstate commerce. Each applies alike to local and interstate operations. Neither undertakes to tax traffic or movements taking place outside Montana or the gross returns from such movements or to use such returns as a measure of the amount of the tax. Both levies apply exclusively to operations wholly within the state or the proceeds of such operations, although those operations are interstate in character.

¹² — Mont. —, —, 172 P. 2d 452, 460. Appellant had argued, as it does here, that even if the "gross revenue" tax is limited to revenue derived from operations in Montana, it is nevertheless invalid for want of any prescribed method on the face of the statute for ascertaining or calculating the tax. The state court held that the statute by necessary implication authorized the board to "adopt any fair and reasonable mode of enforcement designed to effectuate the purposes of the Act." — Mont. —, —, 172 P. 2d 452, 461. In view of our limitation of the question before us, as stated in the text, we need not express opinion concerning this ruling or any tax above the minimum calculated in accordance with it. Cf. note 11.

In another connection the state supreme court adverted to the separability clause contained in § 3847.24 of the statute, though not referring to it expressly in relation to the statement quoted in the text.

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Moreover, it is not material to the validity of either tax that the state also imposes and collects the vehicle registration and license fee and the gallonage tax on gasoline purchased in Montana. The validity of those taxes neither is questioned nor well could be. *Hendrick v. Maryland*, 235 U. S. 610; *Aero-Transit Co. v. Georgia Comm'n*, 295 U. S. 285; *Sonneborn Bros. v. Cureton*, 262 U. S. 506; *Edelman v. Boeing Air Transp.*, 289 U. S. 249. Nor does their exaction have any significant relationship to the imposition of the taxes now in question. *Dixie Ohio Co. v. Comm'n*, 306 U. S. 72, 78; *Interstate Busses Corp. v. Blodgett*, 276 U. S. 245, 251. They are imposed for distinct purposes and the proceeds, as appellant concedes, are devoted to different uses, namely, the policing of motor traffic and the maintenance of the state's highways.¹³

Concededly the proceeds of the two taxes presently involved are not allocated to those objects.¹⁴ Rather they now go into the state's general fund, subject to appropriation for general state purposes.¹⁵ Indeed this fact, in appellant's view, is the vice of the statute. But in that view appellant misconceives the nature and legal effect of the exactions. It is far too late to question that a state, consistently with the commerce clause, may lay upon motor vehicles engaged exclusively in interstate commerce, or upon those who own and so operate them, a fair and reasonable, nondiscriminatory tax as compensation for the use of its highways. *Hendrick v. Maryland*,

¹³ See note 6 and text. It is admitted by the pleadings that the proceeds of the vehicle registration and license tax and the gallonage tax are allocated to the construction, repair and maintenance of state highways.

¹⁴ The board concedes in the brief filed here that the state supreme court was in error in the statement that the revenue from the two taxes presently in issue "is devoted to the building, repairing and policing of such highways" — *Monit.* —, —, 172 P. 2d 452, 462.

¹⁵ See note 3 and text.

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supra; *Clark v. Poor*, 274 U. S. 554; *Aero Transit Co. v. Georgia Comm'n*, *supra*; *Morj v. Bingaman*, 298 U. S. 407; *Dixie Ohio Co. v. Comm'n*, *supra*; *Clark v. Paul Gray, Inc.*, 306 U. S. 583; cf. *S. C. Hwy. Dept. v. Barnwell Bros.*, 303 U. S. 177. Moreover "common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use." *Clark v. Poor*, *supra* at 557.

The present taxes on their face are exacted "in consideration of the use of the highways of this state," that is, they are laid for the privilege of using those highways. And the aggregate amount of the two taxes taken together is less than the amount of similar taxes this Court has heretofore sustained. Cf. *Dixie Ohio Co. v. Comm'n*, *supra*; *Aero Transit Co. v. Georgia Comm'n*, *supra*. The state builds the highways and owns them.¹⁶ Motor carriers for hire, and particularly truckers of heavy goods, like appellant, make especially arduous use of roadways, entailing wear and tear much beyond that resulting from general indiscriminate public use. *Morj v. Bingaman*, *supra* at 411. Although the state may not discriminate against or exclude such interstate traffic generally in the use of its highways, this does not mean that the state is required to furnish those facilities to it free of charge or indeed on equal terms with other traffic not inflicting similar destructive effects. Cf. *Clark v. Poor*, *supra*; *Morj v. Bingaman*, *supra* at 411. Interstate traffic equally with intrastate may be required to pay a fair share of the cost and maintenance reasonably related to the use made of the highways.

This does not mean, as appellant seems to assume, that the proceeds of all taxes levied for the privilege of using the highways must be allocated directly and exclusively

¹⁶ It is immaterial that the state receives federal aid for state road construction, a fact on which appellant places some emphasis.

to maintaining them. *Clark v. Poor*, *supra* at 557; *Morf v. Bingaman*, *supra* at 412. That is true, although this Court has held invalid, as forbidden by the commerce clause, certain state taxes on interstate motor carriers because laid "not as compensation for the use of the highways but for the privilege of doing the interstate bus business." *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183, 186; cf. *McCarroll v. Dixie Lines*, 309 U. S. 176, 179. Those cases did not hold that all state exactions for the privilege of using the state's highways are valid only if their proceeds are required to go directly and exclusively for highway maintenance, policing and administration. Both before and after the *Interstate Transit* decision this Court has sustained state taxes expressly laid on the privilege of using the highways, as applied to interstate motor carriers, declaring in each instance that it is immaterial whether the proceeds are allocated to highway uses or others. *Clark v. Poor*, *supra* at 557; *Morf v. Bingaman*, *supra* at 412.¹⁷

Appellant therefore confuses a tax "assessed for a proper purpose and . . . not objectionable in amount," *Clark v. Poor*, *supra* at 557, that is, a tax affirmatively laid for the privilege of using the state's highways, with a tax not imposed on that privilege but upon some other such as the privilege of doing the interstate business. Though necessarily related, in view of the nature of interstate motor traffic, the two privileges are not identical, and it is useless to confuse them or to confound a tax for the privilege of using the highways with one the proceeds of which are necessarily devoted to maintaining them. Whether the proceeds of a tax are used or required to be used for highway maintenance "may be of significance," as the Court has said, "when the point is otherwise in doubt, to show that the fee is in fact laid for that purpose and is thus a charge for the privilege of using the highways.

¹⁷ See note 18 *infra* and text.

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Interstate Transit, Inc. v. Lindsey, supra. But where the manner of the levy, like that prescribed by the present statute, definitely identifies it as a fee charged for the grant of the privilege, it is immaterial whether the state places the fees collected in the pocket out of which it pays highway maintenance charges or in some other." *Morf v. Bingaman, supra* at 412.¹⁸

The exactions in the present case fall clearly within the rule of *Morf v. Bingaman* and its predecessors in authority, and therefore, like that case, outside the decisions in the *Interstate Transit* and like cases. Both taxes are levied "in consideration of the use of the highways of this state," that is, as compensation for their use, and bear only on the privilege of using them, not on the privilege of doing the interstate business. Moreover, the flat \$10 fee laid by § 3847.16 (a) is further identified as one on the privilege of use by the fact that "unlike the general tax in *Interstate Transit, Inc. v. Lindsey*, 283 U. S. 183, the levy of which was unrelated to the use of the highways, grant of the privilege of their use is by the present statute made conditional upon payment of the fee." *Morf v. Bingaman, supra* at 410.

The minimum so-called "gross revenue" fee, on the other hand, is technically conditioned on the receipt of such revenue from the operations within Montana. But the flat minimum of \$15 annually, which is all we have before us in the shape the case has taken for the purposes of decision here, has none of the alleged vices characteristic of gross income taxes heretofore held to vitiate such taxes laid by the states on interstate commerce. And appellant has advanced no tenable basis in rebuttal of the legislative declaration that this tax too is exacted

¹⁸ In *Clark v. Poor*, the Court stated: "Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs." 274 U. S. 554, 557.

in consideration of the use of the state's highways, i. e., for the privilege of using them, not for that of doing the interstate business. Here, as in *Morff v. Bingaman*, "there is ample support for a legislative determination that the peculiar character of this traffic involves a special type of use of the highways," with enhanced wear, tear and hazards laying heavier burdens on the state for maintenance and policing than other types of traffic create. 298 U. S. 407, 411. It is to compensate for these burdens that the taxes are imposed, and appellant has not sustained its burden. *Clark v. Paul Gray, Inc.*, *supra* at 599, and authorities cited, of showing that the levies have no reasonable relation to that end.¹⁹

It is of no consequence that the state has seen fit to lay two exactions, substantially identical, rather than combine them into one, or that appellant pays other taxes which in fact are devoted to highway maintenance. For the state does not exceed its constitutional powers by imposing more than one form of tax. *Interstate Busses Corp. v. Blodgett*, *supra*; *Dixie Ohio Co. v. Comm'n*, *supra*. And, as we have said, the aggregate amount of both taxes combined is less than that of taxes heretofore sustained. In view of these facts there is not even sem-

¹⁹ Appellant claims that the \$15 minimum fee is unreasonable since it is roughly ten times greater than the tax that would be required if the percentage standard provided in the statute were applied. To accept appellant's position would mean that a state could never impose a minimum fee, but would have to adjust its taxes to the inevitable variations in the use of the highways made by various carriers. The Federal Constitution does not require the state to elaborate a system of motor vehicle taxation which will reflect with exact precision every gradation in use. In return for the \$15 fee appellant can do business grossing \$3,000 per vehicle annually for operations on Montana roads. Appellant was not wronged by its failure to make the full use of the highways permitted. *Aero Transit Co. v. Georgia Comm'n*, 295 U. S. 285; *Morff v. Bingaman*, 298 U. S. 407; cf. *Kane v. New Jersey*, 242 U. S. 160.

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blance of substance to appellant's contention that the taxes are excessive.

Neither is there merit in its other arguments, which we have considered, including those urging due process and equal protection grounds for invalidating the levies.

The judgment of the Supreme Court of Montana is

Affirmed.